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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED *

The Communications Act provides that a private party may bring an injunction action in federal district court to enforce "any order" of the Federal Communications Commission other than for the payment of money. The First Circuit ruled below, in conflict with the Fifth Circuit, that the statutory phrase "any order" does not include an FCC order issued in a rulemaking proceeding. The question presented is:

Whether Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), embraces orders issued by the FCC in the course of rulemaking proceedings, as the FCC has urged and the Fifth Circuit has held, or whether it is limited to FCC orders issued in adjudicatory proceedings, as the First Circuit has held.**

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* The parties in the Court of Appeals, other than those in the caption, were the members of the respondent commission (Peter Bradford, Cheryl Harrington, and Ralph Gelder); and the Federal Communications Commission participated as amicus curiae.

** If certiorari is granted, petitioner reserves the right to argue contingently that the First Circuit also erred because one or both of the orders sought to be enforced was sufficiently "adjudicatory" to qualify for enforcement even if the lower court's narrow reading of Section 401(b) is adopted.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

New England Telephone and Telegraph Company petitions for certiorari to review the judgment and decision of the Court of Appeals in this case.[1]

OPINIONS BELOW

The decision of the Court of Appeals, and a supplemental memorandum on denial of rehearing, which are reported at 742 F.2d 1 and 9, respectively, appear at Pet. App. 1a and 1b, respectively.[2] The decision of the District Court is reported at 570 F. Supp. 1558 and appears at Pet. App. 1c.

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[1] Petitioner New England Telephone and Telegraph Company ("NET") is a wholly-owned subsidiary of NYNEX Corporation ("NYNEX"), which has outstanding securities in the hands of the public. NET has no subsidaries, and it has no affiliates other than corporations that are wholly owned by NYNEX either directly or indirectly.

[2] References to Pet. App. are to the appendices to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1984, and appears at Pet. App. 1d. A timely filed petition for rehearing was denied by a memorandum and order entered September 10, 1984, which appears at Pet. App. 1b. This Court has jurisdiction to review the decision below under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 401(b) of the Communications Act of 1934, 47 U.S.C. § 401(b), provides as follows:

> "(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

STATEMENT OF FACTS

This case presents a direct conflict between the First and Fifth Circuits over the jurisdiction of federal courts to enforce FCC orders under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b). Both cases, and a number of other similar cases now pending in other lower federal courts, arise out of the same background facts.

A. The Preemption Order

Local telephone facilities in the United States, such as the local exchange switches and the lines within the exchange, are used interchangeably to provide both interstate and intrastate telephone service. Recognizing this dual use of local facilities, Congress in Section 220 of the Communications Act [3] gave the FCC overriding authority to determine depreciation and accounting for such facilities; such determinations include the classes of property subject to depreciation and the rates of depreciation to be applied.[4] Section 220 expressly prohibits telephone companies from using any depreciation other than that established by the FCC unless the FCC expressly permits such a departure.[5]

In rulemaking proceedings in 1980 and 1981, the FCC revised its depreciation rules for telephone company facilities.[6] Among other changes, it provided for use of a method of adjusting depreciation estimates known as "remaining life," which the FCC found would produce a more accurate measure of actual depreciation and would assist telephone companies in modernizing telephone plant to meet public demands for improved service. Various state commissions participated in the FCC rulemaking proceedings. Neither the states nor any

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[3] Sections 220(a) and (b), 47 U.S.C. §§ 220(a), (b).

[4] Depreciation is that aspect of accounting that measures the loss of service value or "depreciation" of a capital asset over time and which allocates the resulting depreciation expense to individual years in which the asset is usefully in service. The depreciation expense in each year is a cost of the operation of the business and is recovered through the rates charged for service.

[5] Sections 220(b) and (h), 47 U.S.C. §§ 220(b), (h). The statute also requires that the FCC shall give state agencies an opportunity to present their "views and recommendations" before the FCC prescribes any new accounting requirement including depreciation (Section 220(i), 47 U.S.C. § 220(i)); but the statute does not provide that states can disregard the FCC requirements once the FCC has made its decision.

[6] *In re Amendment of Part 31*, 83 F.C.C.2d 267 (1980), 85 F.C.C.2d 818 (1981), 87 F.C.C.2d 916 (1981). These determinations affected the categories of plant that could be depreciated and the methods by which depreciation would be calculated and revised.

other participants in these proceedings sought judicial review of the FCC's 1980 and 1981 decisions on depreciation.

In regulating local telephone companies, the states have in the past normally respected the FCC's depreciation decisions. Foreseeing no unusual compliance problems in this instance, the FCC initially declined in April 1982 to direct the state agencies to follow the new FCC depreciation decisions.[7] However, as states began to ignore the new decisions, AT&T filed a timely petition for reconsideration of the April 1982 order. General Telephone Company of Ohio, whose state commission expressly refused to follow the FCC's remaining life decision, filed a petition with the FCC seeking a declaratory order that the new depreciation decisions were binding.

The FCC consolidated the AT&T and GTE requests and sought comments from the states. In January 1983, the FCC issued a new order ("the Preemption Order") expressly determining that the states were required to accept the remaining life and other depreciation decisions of the FCC.[8] The FCC order based its determination on two independent grounds; one was its express statutory authority to render binding depreciation determinations under Section 220; the other ground was the FCC's inherent authority under the Act to preempt state regulation where necessary to achieve federal policy goals. The FCC directed that its Preemption Order be served upon each of the state commissions.

State representatives did seek judicial review of the Preemption Order in the Fourth Circuit. In the absence of a stay, the order went into effect in early 1983.[9] In 1984, following a

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[7] *In re Amendment of Part 31*, 89 F.C.C.2d 1094 (1982). Four Commissioners supported this decision; three dissented. The dissenting opinion warned that states were beginning to disregard the FCC's determinations and would, absent FCC preemption, frustrate the substantive depreciation policies adopted in 1980 and 1981. *Id.* at 1110-11.

[8] *In re Amendment of Part 31*, 92 F.C.C.2d 864 (1983).

[9] A stay was denied by the FCC. *In re Amendment of Part 31*, FCC 83-349, released July 26, 1983.

uniform line of circuit court decisions sustaining the FCC's preemptive power, the Fourth Circuit affirmed the Preemption Order on the merits.[10]

B. The District Court Enforcement Proceeding Under Section 401(b)

On May 9, 1983, the present case began with the filing by New England Telephone and Telegraph Company ("NET") of an injunction action in the United States District Court in Maine against the Maine Public Utilities Commission ("Maine Commission"). NET showed that in April 1983 the Maine Commission in a proceeding to set rates for NET had expressly refused to accept the FCC's determination that NET was entitled to use remaining life in computing depreciation; the Maine Commission said that the FCC had "erred" in adopting its Preemption Order and "therefore we do not consider the Maine Commission bound" by the FCC order.[11] The Maine Commission therefore refused to allow NET to utilize remaining life depreciation and placed itself in direct disobedience of the FCC's Preemption Order.[12]

The NET complaint pointed out that the FCC had also issued a specific order prescribing depreciation rates for NET's telephone plant located in Maine ("Prescription Order").[13] This order, issued in December 1982, followed the FCC's usual practice in setting specific depreciation rates for major telephone companies. The FCC's December 1982 Prescription Order, issued after notice to the Maine Commission and

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[10] *Virginia State Corporation Commission* v. *FCC*, 737 F.2d 388 (4th Cir. 1984). Although state representatives undoubtedly will seek further review of the Fourth Circuit decision, it does not present the enforcement question raised in this case, nor any other inter-circuit conflict.

[11] *New England Telephone and Telegraph Company*, Docket No. 82-124, April 26, 1983, p. 36, *aff'd on other issues sub nom. New England Telephone and Telegraph Co.* v. *Public Utilities Commission*, No. Ken-83-190, Maine Sup. Judicial Ct., Jan. 9, 1984.

[12] Maine could have sought judicial review of that order (28 U.S.C. § 2342) or intervened in the Fourth Circuit. 28 U.S.C. § 2348. It took neither step.

[13] *Prescription of Revised Percentages of Depreciation*, 92 F.C.C.2d 920 (1982).

discussion with the Maine Commission staff, incorporated the remaining life method in establishing the new depreciation rates for NET. The Maine Commission action in April 1983, refusing to accept remaining life as a basis for NET depreciation rates, therefore violated the FCC's Prescription Order, as well as its Preemption Order.

In seeking injunctive relief in the District Court, NET relied on Section 401(b) of the Communications Act to confer jurisdiction on the Court to enforce FCC orders at the instance of a private party. Section 401 has two different enforcement provisions. Subsection (a) provides that the District Courts may issue mandamus at the request of the Attorney General where any person fails to comply with a *provision* of the Communications Act itself. Subsection (b), invoked by NET in the present case, applies to *orders* of the FCC and provides in pertinent part:

> "If any person fails or neglects to obey any order of the [Federal Communications] Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction [or other appropriate process] . . . . "

In the Maine proceeding, the District Court entered an injunction requiring the Maine Commission to respect the FCC's depreciation determinations. Pet. App. 1c.[14] The District Court found that the Preemption Order was intended to be binding on state regulatory bodies; that the state commissions were embraced by Section 401(b); that the Preemption Order had been regularly made and duly served within the meaning of Section 401(b); and that Section 401(b) included the Preemption Order.

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[14] *New England Telephone and Telegraph Company* v. *Public Utilities Commission of Maine*, 570 F. Supp. 1558 (1983).

C. The Conflict Between the Circuits

On review of the District Court decision, the First Circuit reversed,[15] holding that the Preemption Order could not be enforced under Section 401(b). Pet. App. 1a. Although that section expressly permits private enforcement of "any order" other than one for the payment of money, the First Circuit construed the phrase "any order" as limited to adjudicatory orders and as not embracing orders issued in a rulemaking proceeding. The First Circuit acknowledged that this Court in *CBS* v. *United States*, 316 U.S. 407 (1942), had construed the term "order" in an adjacent subsection of the Act to embrace orders issued in rulemaking proceedings; but the First Circuit held that for policy reasons the term "order" in Section 401(b) should be construed more narrowly.

The principal policy reason offered by the First Circuit for reading the term "order" so restrictively in Section 401(b) was the court's concern that allowing private parties to enforce orders resulting from FCC rulemakings could interfere with the FCC's own control over enforcement of its rules. However, when NET petitioned the First Circuit for rehearing, the FCC filed an amicus brief urging that Section 401(b) did embrace orders issued in rulemaking proceedings; and it affirmed that such a result would not threaten FCC enforcement authority but would supplement and enhance it.[16] On September 10, 1984, the First Circuit denied NET's petition for rehearing. Pet. App. 1b.

Scarcely a month later, on October 11, 1984, the Fifth Circuit reached the opposite result in affirming a Section 401(b) injunction obtained by Southern Central Bell Telephone Company against the Louisiana Public Service Commission.[17] Citing the *CBS* case and a number of other precedents, the Fifth Circuit explicitly rejected the First Circuit's narrow

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[15] *New England Telephone and Telegraph Company* v. *Public Utilities Commission of Maine*, 742 F.2d 1, *memorandum and order denying rehearing*, 742 F.2d 9 (1984).

[16] Memorandum of FCC as amicus curiae, July 27, 1984, pp. 10-17.

[17] *South Central Bell Telephone Company* v. *Louisiana Public Service Commission*, 744 F.2d 1107 (1984), *appeal docketed*, No. 84-870.

interpretation of Section 401(b). After a detailed analysis, the Fifth Circuit concluded that "both precedent and sound policy support a broad interpretation of § 401(b) to allow private enforcement of FCC rules and regulations," and it held, in direct conflict with the First Circuit, that "the FCC Preemption Order is an order within the meaning of § 401(b)." 744 F.2d at 1118-19 (omitting footnotes).[18]

The Maine and Louisiana District Court actions are only two of a number of similar enforcement actions brought in District Courts under Section 401(b), to compel state commissions to respect FCC depreciation determinations. Such injunctions have been issued, for example, in Kansas, Washington, Arkansas and Maryland.[19] However, the First and Fifth Circuits are apparently the only Courts of Appeals that have as yet addressed the particular question at issue in this case.[20]

REASONS FOR GRANTING THE WRIT

Certiorari is justified in this case on several independent grounds. First, the central issue in the case—the interpretation of Section 401(b) of the Communications Act—is one on which the First and Fifth Circuits are in direct conflict so that a decision by this Court is necessary to ensure that the federal

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[18] The Louisiana Commission filed a notice of appeal to this Court in the Fifth Circuit, and its jurisdictional statement in this Court has just been docketed as No. 84-870.

[19] *Chesapeake and Potomac Telephone Company of Maryland* v. *Public Service Commission of Maryland*, 560 F. Supp. 844 (D. Md. 1983), *appeal pending*, No. 83-1403, 4th Cir.; *Pacific Northwest Bell Telephone Company* v. *Washington Utilities and Transportation Commission*, 565 F. Supp. 17 (W.D. Wash. 1983), *appeal pending*, No. 83-3746, 9th Cir.; *Southwestern Bell Telephone Company* v. *State Corporation Commission*, No. 83-4090, D. Kan., April 8, 1983.

[20] Although *other* issues were raised and decided in *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483, that case does not in fact present the Section 401(b) issue on which a conflict now exists between the First and the Fifth Circuits. The Arkansas Commission did not argue to the Eighth Circuit that Section 401(b) embraces only adjudicatory orders, and the Eighth Circuit therefore did not rule on that issue.

courts apply that statute in a consistent manner. Second, in *CBS* v. *United States*, 316 U.S. 407 (1942), this Court construed the same statutory language ("any order") used in a companion section of the Communications Act to *include* orders issued in rulemakings. Third, the issue presented is one of substantial public importance affecting the administration of a major federal statute; the decision below impairs the effective enforcement of the Communications Act and does so over the direct objection of the federal agency charged with administering the statute.

A. There Is a Direct Conflict Between the First and the Fifth Circuits.

Section 401(b) of the Communications Act authorizes "any party injured" to bring a federal enforcement action against "any person" who disobeys "any order" of the FCC, except an order for the payment of money. The issue in this case is whether the word "order" as used in Section 401(b) includes an order, such as the FCC's Preemption Order of January 6, 1983, insofar as the order is issued in the course of a rulemaking rather than an adjudicatory proceeding.[21] A direct conflict between the circuits exists on this legal issue.

The First Circuit below held that Section 401(b) is limited to adjudicatory orders so that the Preemption Order is not an "order" within the meaning of Section 401(b). It therefore directed the District Court to dismiss NET's private action to enforce the Preemption Order. Only a month later, the Fifth Circuit ruled that the Preemption Order is an order enforceable under Section 401(b), holding that the phrase "any order" embraces orders that have resulted from rulemakings as well as adjudicatory orders.[22] The Fifth Circuit therefore sustained an injunction against the Louisiana Commission requiring it to

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[21] The Preemption Order was issued, at least in part, in a rulemaking docket and throughout this petition it is so treated without prejudice to NET's right to argue contingently that it should prevail even if the statute is limited to adjudicatory orders.

[22] *South Central Bell Telephone Company* v. *Louisiana Public Service Commission*, *supra*.

obey the *same* Preemption Order that the First Circuit held not to be enforceable under Section 401(b) against the Maine Commission.

The Fifth Circuit had before it the opinion of the First Circuit in this case. The Fifth Circuit considered all of the arguments made in that opinion for reading into Section 401(b) a limitation—not contained in the language of the statute—restricting it solely to adjudicatory orders. The Fifth Circuit declared:

> "[T]he Louisiana Commission is in effect inviting us to travel down the same path recently traversed by the First Circuit in *New England Tel. & Tel. Co.* . . . . After carefully reviewing the arguments both in favor and against adopting such a narrow interpretation of § 401(b), however, we find that we must decline this invitation . . . ." [23]

The statutory issue posed by the conflict is not an isolated one limited to two circuits. The Preemption Order itself is binding on every public utility commission of every state. A number of state commissions have sought to ignore it, and enforcement actions have been brought in District Courts in a number of circuits. Although apparently the statutory issue raised in this case has as yet been decided in only the First and Fifth Circuits (see p. 8 above), it is sure to be litigated in other circuits in connection with the Preemption Order's enforcement. In addition, the issue is likely to recur in enforcing *other* FCC orders in the future.[24] The direct disagreement of two circuits on a recurring issue of federal statutory construction amply justifies Supreme Court review. See Sup. Ct. R. 17.1(a).

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[23] *South Central Bell Telephone Co.* v. *Louisiana Public Service Commission*, *supra*, 744 F.2d at 1116.

[24] A private enforcement action only recently was brought under Section 401(b), and resulted in a District Court injunction, where the Kansas Commission refused to respect an entirely different order of the FCC. *Southwestern Bell Telephone Company* v. *State Corporation Commission of Kansas*, No. 83-4125, D. Kan., Aug. 17, 1984, *appeal pending*, No. 83-4125, 10th Cir.

B. The First Circuit Has Mistakenly Construed Section 401(b) in Disregard of This Court's CBS Decision.

To hold that an order issued in a rulemaking proceeding is not an "order" within the meaning of Section 401(b), the First Circuit was obliged to reject as controlling a leading decision of this Court. In *CBS* v. *United States*, 316 U.S. 407 (1942), this Court construed the identical language at issue in this case ("any order"), as it appears in the next section of the Communications Act, Section 402(a), 47 U.S.C. § 402(a); and this Court held that the quoted language *did* embrace orders issued in FCC rulemaking proceedings.[25] The First Circuit now has adopted exactly the opposite reading of the same term "order" as it appears in Section 401(b).

Many years ago this Court recognized the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). That inference is strongly reinforced in this case where both sections use the term "order" in determining whether and when private parties are entitled to bring suit respecting FCC actions. The anomaly of the First Circuit's decision, and the departure from *CBS*, is underscored by the result: as matters now stand in the First Circuit, the Preemption Order is an "order" (under Section 402(a)) so that Maine could have sought direct judicial review of it within 60 days of its issuance; yet it is not an "order" (under Section 401(b)) when NET seeks to enforce it.

The First Circuit sought to avoid the force of the *CBS* precedent by arguing that there were policy reasons favoring a broad reading of the term in Section 402(a) and policy reasons for a narrow construction of the same term in Section 401(b).

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[25] In *CBS*, the network brought suit to challenge the validity of two orders of the FCC promulgating the so-called chain broadcasting regulations. Section 402(a), on which the suit was premised, permitted actions to review "any order" of the FCC except those involving licenses. Permitting the suit to proceed, this Court held in *CBS* that the phrase "any order" did embrace orders promulgated in a rulemaking proceeding.

The short answer is that the principal policy difference urged by the First Circuit—a concern that a broad interpretation of Section 401(b) could interfere with the FCC's administration of the Act—has been squarely rejected by the very agency that the First Circuit purported to protect. Instead, the FCC has urged that interpreting Section 401(b) as broadly as Section 402(a) will assist the FCC in administering the Act. See pp. 13-14, below.

Apart from the *CBS* precedent, there are other compelling indications that the First Circuit is mistaken. The First Circuit's interpretation imposes a major restriction on Section 401(b)'s unqualified reference to "any order." Yet the distinction between adjudications and rulemakings was well established in 1934, and it would have been easy for Congress to restrict Section 401(b) to "adjudicatory orders" had it wished to do so. Nor is there any evidence in the Act's legislative history to suggest that Congress intended such a restriction on Section 401(b).

Finally, the First Circuit's decision has the remarkable consequence of creating a significant gap in the Act's scheme of remedies. As a result of the First Circuit's narrow construction, Section 401 would authorize mandamus to enforce the Act itself and injunctions to enforce adjudicatory orders; yet it would provide *no* judicial remedy, either Governmental or private, to enforce FCC rules or other FCC orders issued in rulemaking proceedings.[26] Such a result argues strongly against the First Circuit's reading of the Act.

C. The First Circuit Decision Impairs Enforcement of the Communications Act.

The main premise of the First Circuit's policy argument for a narrow construction of Section 401(b) is that the FCC can itself bring judicial actions or issue orders to enforce an order

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[26] Although the First Circuit apparently assumed that suits to enforce FCC rules could be brought under Section 401(a), Section 401(a) by its terms is limited to enforcement of "provisions of [the Act]"; and it is by no means inevitable that violation of an FCC regulation would in each case involve a violation of the Act as well.

issued in a rulemaking proceeding. The difficulty is that the FCC cannot be everywhere at once. As the FCC explained to the First Circuit in supporting rehearing, FCC enforcement efforts are an exercise in selectivity, requiring that the agency balance the magnitude of the risk to its own concerns against the scarcity of its resources and the importance of its other obligations.[27] The Fifth Circuit correctly observed:

> "[W]e simply do not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined by giving the FCC discretion to adopt self-executing rules and then to rely in part on private enforcement. We firmly believe, in fact, that under appropriate circumstances such an approach would promote significant federal interests in conserving limited agency resources and in accelerating the implementation of FCC rules and regulations." [28]

This very case illustrates how important are private enforcement actions as an adjunct to FCC enforcement. The Preemption Order is national in scope and has been disobeyed in a number of states, with resulting financial harm to the telephone companies. Beyond the companies' interest, the use of more modern and accurate depreciation rules is, as the FCC found in its 1980 and 1981 orders, a matter of public interest in order to stimulate the modernization of the telephone system. Because the FCC has not found it feasible to initiate actions every time a state agency disregards the depreciation rules laid down by the FCC, only private enforcement actions can assure timely enforcement.

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[27] Motion of the FCC for leave to file memorandum as amicus curiae in support of petition for rehearing, July 27, 1984, pp. 3-4. The practical reality is that, with a limited legal staff, the FCC's main responsibility is to defend its policy decisions in the Courts of Appeals. The agency has, however, filed amicus briefs in a number of the District Court actions brought by the telephone companies to enforce the Preemption Order.

[28] *Southern Central Bell Telephone Company* v. *Louisiana Public Service Commission, supra,* 744 F.2d at 1118.

The First Circuit said that FCC regulations or other orders issued in rulemakings may sometimes be ambiguous, so that allowing private actions would create a risk of judicial interpretations at odds with those that the agency might adopt. However, adjudicatory orders—clearly enforceable in private actions under Section 401(b)—are not inherently more specific or precise except in the case of orders for the payment of money, the very class of orders *excluded* from Section 401(b). Further, ample means exist, including a primary-jurisdiction reference to the agency or its amicus participation, to resolve uncertainties where they occur.[29] Finally, possible uncertainty in some hypothetical case is no excuse for refusing to allow a private action in this case where there is *no* uncertainty because the state agency has expressly refused to respect the FCC's depreciation requirements.

A more fundamental objection to the First Circuit's "policy" argument is its disregard for the position taken by the FCC itself. The agency is in the best position to judge whether private enforcement will assist or interfere with agency regulation. Where, as here, the agency has clearly spoken in favor of private enforcement, there is every reason to construe the statute in accordance with its literal language and permit such actions.

Some years ago Chief Justice Burger, in sustaining the authority of the FCC over facilities located in a single state, observed that the United States now has "a unified system of communication" whose effective regulation would be frustrated in the absence of a "central authority."[30] Effective regulation can as easily be frustrated where the "central authority" issues orders which are then disregarded. Weight should therefore be

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[29] Agency regulations cast in the most general terms (such as the fraud and proxy rules of the Securities Exchange Commission) are often the subject of private litigation. The courts have not hesitated to request or permit agency participation where necessary.

[30] *General Telephone Co. of California* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.) (Burger, J.), *cert. denied*, 396 U.S. 888 (1969).

given to the FCC's statement to the First Circuit that its decision could result in "widespread denial of enforcement of significant FCC regulatory orders that, in the FCC's view, should be enforced under Section 401(b)." FCC motion, *supra*, at 2.

CONCLUSION

For the reasons stated, certiorari should be granted in this case.

Respectfully submitted,

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December 1984

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 83-1779

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *etc.*,
Plaintiff, Appellee,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, *et al.*,
Defendants, Appellants.

Appeal from the United States District Court
for the District of Maine
[Hon. Gene Carter, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge,*
BREYER, *Circuit Judge,*
and GIERBOLINI,* *District Judge.*

William E. Furber, with whom *Charles F. Dingman, Cushing P. Samp, Joseph G. Donahue, Peter L. Murray*, and *Murray, Plumb & Murray* were on brief, for appellants.

Francis X. Bellotti, Attorney General, and *Charles R. Peck*, Assistant Attorney General, Commonwealth of Massachusetts, Utilities Division, Public Protection Bureau, on brief for the Attorney General for the Commonwealth of Massachusetts, *amicus curiae.*

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* Of the District of Puerto Rico, sitting by designation.

Robert A. Lewis, with whom *Ralph I. Lancaster, Jr.*, *Everett P. Ingalls*, and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief, for New England Telephone and Telegraph Company.

June 29, 1984

BREYER, *Circuit Judge*. In this case a private party seeks to enforce a decision of the Federal Communications Commission against a recalcitrant state utilities commission. The FCC promulgated a rule that required state public utility commissions to follow a certain method for calculating depreciation of telephone company equipment. The Public Utilities Commission of Maine ("the P.U.C.") evidently ignored the FCC rule. The private party, namely the New England Telephone Company, invoking the authority of section 401(b) of the Federal Communications Act, 47 U.S.C. §401(b), obtained a federal district court injunction requiring the Maine commission to comply with the FCC rule. 570 F.Supp. 1558 (D. Me. 1983). Section 401(b) of the Act states that if anyone

> fails or neglects to obey any order of the [Federal Communications] Commission . . . , any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.

We find that the word "order" in this statute does not include an FCC rulemaking decision of the sort here at issue. Thus, the district court lacked authority to issue the injunction.

I

We start by examining the FCC decision at issue. The decision focused upon the question of how to recapture through depreciation charges the cost of a telephone company asset that has unexpectedly lost some of its anticipated economic value. (For a general description of cost recovery through regulated rate-setting, see *Distrigas of Massachusetts Corp. v. FERC*, No.

83-1633 (1st Cir. June 14, 1984).) To take an oversimplified, imaginary example to illustrate the problem, suppose that the telephone company originally thought that some connecting equipment (say, a $50 fuse) installed in 1960 on the line between a house and a street pole would last fifty years. The company might initially depreciate the equipment at the rate of $1 per year. Suppose further that in 1980, after the company has recaptured $20 through depreciation charges, a new, dirt cheap, technological development makes it sensible to replace the fuse in 1985, instead of in the year 2010. How should the company recapture the remaining $30 of its original equipment cost? One depreciation method, called the "whole life" method, would have the company recalculate the annual depreciation charge for future years by dividing the original $50 cost by the newly estimated whole life of the asset (25 years). Thus, for the next five years, the company would charge $2 per year. By 1985, the company, then, would have recovered $30 of its $50 investment; the remainder would be recovered after the fuse was taken out of service. Another method, called the "remaining life" method, would have the company recalculate the annual depreciation allowance by dividing the remaining undepreciated cost of the fuse ($30) by its remaining useful life. So, the company would charge $6 per year for the years 1981 to 1985, recovering the total cost by the time the fuse was retired from service.

The economic implications of the choice between these methods are likely to be complex and may be of great importance. *See generally* Cornell, Pelcovits, & Brenner, *A Legacy of Regulatory Failure*, Regulation, July/Aug. 1983, at 37; Fogarty, *Capital Recovery: A Crisis for Telephone Companies, A Dilemma for Regulators*, Pub. Util. Fort., Dec. 8, 1983, at 13. The "remaining life" method, for example, apparently means that consumers will have to pay more in the near future, but less in the more distant future. Moreover, there are those who argue that in the newly deregulated telephone world, the foreseeably longterm higher "phantom" depreciation charge resulting from the whole life approach (say, $2 extra per year from 1985 to 1995 to recover for the replaced fuse) could lead important customers to switch from the regular

telephone system to other lower priced (but economically more costly) systems. If so, customer desertion could deprive the regular system of important sources of revenue and burden remaining customers with still higher charges.

Whether or not these concerns are accurate, the fact is that in 1980 the FCC announced that it would switch from "whole life" to "remaining life" depreciation methods. *In re Amendment of Part 31, etc.*, 83 FCC 2d 267 (1980), *reconsidered*, 87 FCC 2d 916 (1981). And in December 1982 it ruled that New England Telephone and certain other phone companies must use "remaining life" systems in setting their *inter*state rates. *In re Prescription of Revised Percentages of Depreciation, etc.*, 92 FCC 2d 920 (1982). It expressly said, however, that it would determine the applicability of its choice of methodologies to *intra*-state rates (the subject now before us) in a "separate proceeding." *Id.* at 928-29.

The "separate proceeding" was a rule-making proceeding, which initially involved a different depreciation question, namely whether certain telephone assets should be depreciated or treated as current expenses. *In re Amendment of Part 31, Uniform System of Accounts, etc.*, Docket No. CC 79-105. The FCC concluded that some of the assets should be charged as current expenses, at least insofar as *inter*state rates were concerned. 85 FCC 2d 818 (1981), *clarified as only affecting interstate rates*, 89 FCC 2d 1094 (1982). Several phone companies then asked the FCC to reconsider whether it should not apply its rule to *intra*-state rates as well.

In the meantime, an Ohio telephone company asked the FCC for a "declaratory ruling" that the Commission's newly announced preference for a "remaining life" depreciation system applied to *intra*-state, as well as to *inter*state, rates and preempted contrary preferences of state regulatory commissions. The FCC evidently believed that the Ohio case and the *Part 31* case reconsideration both involved the same general question, whether the FCC should require state commissions to apply FCC depreciation policies in intra-state ratemaking. Hence, it consolidated the two proceedings.

In January 1983 the FCC announced its decision in the (now consolidated) *Part 31* reconsideration. 92 FCC 2d 864 (1983). It held that its methods for calculating depreciation were automatically binding upon the state commissions under the Communications Act, 47 U.S.C. §220(b). It added that, in any event, even if the federal Act did not *automatically* preempt the right of state commissions to follow different depreciation methods for intra-state transactions, the Commission could (and did) forbid their doing so, for a nationally uniform depreciation policy was of great importance to a sound national communications policy. The Maine P.U.C. was not a party to the *Part 31* reconsideration proceeding, but some other state regulatory commissions were, and several of these commissions have appealed the FCC's ruling to the Fourth Circuit, where the case awaits decision. *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir.).

In April 1983, three months after the FCC's consolidated *Part 31* reconsideration decision, the Maine P.U.C. denied New England Telephone a rate increase in part because the increase rested upon the use of "remaining life" depreciation. The Maine commission decided that the FCC decision was unlawful—that the FCC could not tell it what depreciation methods to use. New England Telephone appealed the P.U.C.'s decision to the Maine Supreme Judicial Court, but it did not raise the "remaining life" issue in its appeal. Instead, it went to federal court, under 47 U.S.C. §401(b), arguing that the Maine commission's defiance of the FCC was unlawful and should be enjoined. The federal district court agreed. The Maine P.U.C. now appeals its decision.

II

The FCC decision at issue is the product of a rulemaking proceeding, namely the *Part 31* reconsideration. *See* pages 19-20 *infra*. The decision also fits the Administrative Procedure Act's definition of a "rule:" It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. §551(4). Hence, we consider it to be a rule. And, we ask whether such a rule can also be considered an "order of the Commission" within the terms of section 401(b) of the Com-

munications Act. We note that several other courts have been asked to enforce the preemptive effect of the FCC's *Part 31* reconsideration decision pursuant to section 401(b), and a number of them have granted the requested injunctions. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 570 F.Supp. 227 (M.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission*, 565 F.Supp. 17 (W.D. Wash. 1983); *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 560 F. Supp. 844 (D. Md. 1983). But none of the courts granting injunctions, aside from the district court below, have directly addressed the question the Maine P.U.C. has raised here: whether the FCC's decision constitutes an "order" in the contemplation of section 401(b). We conclude that it does not, for several reasons.

First, the Administrative Procedure Act defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking* . . . ." 5 U.S.C. §551(6) (emphasis added). Although this definition applies to the APA, enacted in 1946, and not necessarily to the Communications Act, enacted in 1934, the APA was the product of extensive study of pre-existing procedure. Some of its provisions—particularly those governing judicial review—were largely declaratory of existing law. Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1829 (1978). And, post-APA statutes and rules typically incorporate the APA's concepts and distinctions. Thus, even if pre-APA statutes used the term "order" inconsistently, procedural coherence warrants reference to the APA's definitions as a starting point and their use as a guide in determining the proper construction of pre-existing, related procedural statutes—at least where other non-APA considerations also point clearly in the same direction. *See Kroeger v. Stahl*, 148 F.Supp. 403, 406 (D.N.J.) (using APA definition of "order" in interpreting 47 U.S.C. §401(b)), *aff'd*, 248 F.2d 121 (3rd Cir. 1957).

Second, to interpret section 401(b) more broadly—to apply it beyond the context of the "adjudicatory order"—threatens to interfere seriously with the well established principle that the "enforcement" of the Communications Act is "entrusted primarily to an administrative agency." *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *see Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982) ("The focus of the Act is the general public, with the FCC, not the private litigant, as its champion."). Section 401, in relevant part, reads as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.
>
> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The first part, subsection (a), allows the *Commission* to ask a federal court to enjoin "a failure to comply with or a violation of any of the provisions" of the Act; the second part, subsection (b), allows a private person to require compliance with a Commission "order." Section 401(a) allows the Commission to decide precisely where and how to enforce the Act. Section 401(b) is consistent with the Commission's prerogatives under

section 401(a) only if the term "order" is read to apply exclusively to those cases in which the Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate. Only then would the Commission retain enforcement initiative, selecting a particular target for regulatory action and specifying the regulatory constraints that are to govern the target.

Third, to interpret "order" in section 401(b) broadly enough to encompass rules threatens the sound development of a coherent nationwide communications policy—a central objective of the 1934 Act. *See* 47 U.S.C. § 151; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Benanti v. United States*, 355 U.S. 96, 104 n.14 (1957). Rules are general in form and they can be highly general in content. *See, e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 418 (1942) ("Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply."); *Precious Metals Associates, Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 911 (1st Cir. 1980) ("Rulemaking proceedings are . . . designed to fill in the interstices of a statute.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) and *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973)); *PBW Stock Exchange, Inc. v. SEC*, 485 F.2d 718, 732 (3rd Cir. 1973) ("Rulemaking . . . characteristically involves . . . declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it."), *cert. denied*, 416 U.S. 969 (1974).

To apply a rule to particular cases often (though not always) requires not only adjudicatory fact finding, but also interpretation of the rule's scope and meaning. *See, e.g., Gardner v. Toilet Goods Association*, 387 U.S. 167, 193-98 (Fortas J., dissenting) (1967); *Board of Trade v. Commodity Futures Trading Commission*, 704 F.2d 929, 932-33 (7th Cir. 1983). To construe 401(b) to include a private right to enforce

commission rules would place this interpretive function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (and inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy. And one need only look at the highly general language in which some Commission rules are stated to realize that this shift of power from Commission to courts is not merely a theoretical concern. *See, e.g.*, 47 C.F.R. §21.3 (general principles of telecommunications licensing); 47 C.F.R. §73.1920 (personal attack rule). There is no reason to believe that Congress intended an interpretation of 401(b) that could threaten such a shift or undermine the well established bar against private actions to enforce the Communications Act. *See, e.g., Lechtner v. Brownyard, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co., supra.*

Fourth, the Act's statutory review provisions can be read more fairly and coherently if 401(b) is construed narrowly. The normal way to obtain review of an FCC order is for a party to petition a circuit court of appeals. 47 U.S.C. §402; *see, e.g., City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979) (§402 as exclusive route to judicial review). Section 401(b) seems to foresee such review, for it discourages the district courts from reexamining the validity of the FCC "order" in question. It states that if, "after hearing, th[e] court determines that the order was regularly made and duly served," the court shall enforce obedience; this language suggests that the substantive validity of the order is not to be considered. *See Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, No. 84-1488 (8th Cir. June 7, 1984); *American Bond & Mortgage Co. v. United States*, 52 F.2d 318, 320 (7th Cir. 1931), *cert. denied*, 285 U.S. 538 (1932); *United States v. National Plastikwear Fashions, Inc.*, 123 F.Supp. 791, 793-94 (S.D.N.Y. 1954). This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient

person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding. *Compare Yakus v. United States*, 321 U.S. 414 (1944) (administrative regulation can be enforced in proceeding which precludes review of validity of the regulation) *with Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (suggesting troubling nature of the *Yakus* holding and its limited reach) *and id.* at 289-90 (Powell, J., concurring) (same). The anomaly of such a restriction on proceedings to enforce rules would have been perceived still more forcefully in 1934, when 'pre-enforcement' review of rules was virtually non-existent—when the validity of a rule was typically first considered at the time of enforcement. *See, e.g., Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 383-85 (1938); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 196-97 & n.55, 202-03 (1974). *Cf. Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70-71 & n.20 (1970). And this fact makes it rather unlikely that Congress believed section 401(b) would apply to Commission rules.

Fifth, other sections of the Communications Act use the word "order" in a way that seems to envision Commission decisions requiring specific actions of specific carriers. *See, e.g.*, 47 U.S.C. §§201 (orders directing carriers to establish through services); 204 (orders concerning collection and refund of proposed increased rates); 205 (order directing carrier to cease and desist from charging unreasonable rates); 209 (order directing carrier to pay damages for violation of Act); 214(d) (order directing carrier to expand its facilities). With one exception, to which we shall turn shortly, we are unaware of any provision that uses the word "order" to refer to FCC interpretations of the Act or to FCC rules of general applicability. Indeed, section 416 of the Act, 47 U.S.C. §416(a), provides that "[e]very order of the Commission shall be forthwith served upon the designated agent of the carrier . . . ." This language suggests that Congress assumed that "orders" took the form of specific directives to specific parties.

Sixth, to allow communications common carriers to enforce generalized FCC policy against state commissions through 'enforcement' suits in federal district courts threatens issue splitting and procedural complexity. New England Telephone, for example, might readily have raised the 'depreciation' problem in the Maine Supreme Judicial Court, where it obtained review of the rest of the P.U.C.'s rate decision in which the depreciation issue was embedded. Instead, it expressly withheld the issue from that proceeding, bringing it before the federal district court instead, thereby leaving the state court in the difficult position of trying to judge the reasonableness of certain of the P.U.C.'s determinations—the selection of a rate of return fairly reflecting the risks to investors, for example—without considering the closely inter-related depreciation issue. The Maine courts were to review Hamlet without the Prince; the federal courts, the Prince without the rest of the play. Since the supremacy clause of the federal Constitution requires the Maine courts to apply federal communications law where appropriate, we see no reason to read the statute to encourage this form of fractionated review.

III

Before concluding, we consider three arguments in New England Telephone's favor:

First, in *Columbia Broadcasting System v. United States*, *supra*, the Supreme Court interpreted the word "order" in 401's neighboring section, section 402, to encompass agency rules promulgated after rule-making proceedings. Thus, our interpretation requires reading the same word differently in the two sections. While we recognize the force of the argument calling for a similar construction, *see, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Firestone v. Howerton*, 671 F.2d 317, 320 & n.6 (9th Cir. 1982), we find sufficient difference in the functions of the two sections to justify assigning a different scope to the same word in the two settings. *See, e.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 104 S. Ct. 575 (1984); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461 n.230 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

Section 402(a), which the *CBS* Court considered, concerns judicial review of FCC decisions. It states

> Any proceeding to enjoin, set aside, annul, or suspend any *order* of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 U.S.C. §402(a) (emphasis added); *see* 28 U.S.C. §2342 ("The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final *orders* of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . . .") (emphasis added). *CBS* concerned the FCC's Chain Broadcasting Regulations, which told broadcasting stations in part how they were to deal with the networks. CBS argued that the Court should review the regulations' lawfulness, despite the absence of any enforcement order based on the regulations. If it had to wait until the regulations were enforced to secure judicial review of their validity, it might have to wait forever, CBS said, for the stations intended to obey the regulations, to CBS's detriment. Thus, to interpret "order" in section 402 to apply only to the outcome of an adjudicatory enforcement proceeding would deprive those who might be seriously injured by others' obedience to an FCC rule of any opportunity to challenge the rule's legal validity. The Court agreed. And it considered the regulations to have sufficiently serious and immediate impact to warrant pre-enforcement review of their lawfulness. Accordingly, rules were swept within the scope of section 402's reference to "any order."

As this statement of the issues in *CBS* reveals, the policy concerns relevant to a proper interpretation of the word "order" in section 402 involve fundamental principles of judicial review and fair treatment. These concerns point towards a broad interpretation of the word in section 402, but no such considerations are at issue in the case of section 401. To the contrary, private parties have no inherent right to enforce FCC rules, and, as we have remarked above, considerations of fairness favor, if anything, a narrow construction of section 401's

reference to "any order." In the absence of some strong policy reason favoring a broad interpretation of "order" in section 401, the various considerations previously discussed seem sufficient to outweigh the importance of linguistic uniformity among *different sections* of the statute.

Second, New England Telephone denies that the FCC decision here at issue was embodied in a "rule;" rather, it contends we should consider it as an adjudicatory order. The decision was called a "Memorandum Opinion and *Order*" (emphasis added); and it was issued as a "declaratory order" pursuant to 47 C.F.R. §1.2 (authorizing the Commission to issue declaratory rulings, in accordance with section 5(e) of the APA, 5 U.S.C. §554(e)). As the Supreme Court has said, however, "[t]he particular label placed upon [a decision] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. at 416. The FCC commonly adopts rules in opinions called "orders." *See, e.g.*, 47 C.F.R. §1.429(i); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. at 425. And, in this instance, the proceedings that led to the decision were "properly treated by the FCC as rule making proceedings under 47 C.F.R. §§1.399—1.429." 570 F.Supp. at 1571. The FCC has confirmed that the decision "was adopted as part of a rulemaking docket." Memorandum of Federal Communications Commission as Amicus Curiae at 16. There is no indication that anyone followed adjudicatory, rather than rulemaking, procedures.

The temptation to refer to the FCC's deliberations as an "adjudicatory proceeding" that led to a "declaratory order" arises from the FCC's consolidation of the pure *Part 31* rulemaking proceeding with GTE of Ohio's declaratory action against the Ohio Public Utilities Commission. The latter action—entitled "Petition for Declaratory Ruling"—might perhaps be regarded as adjudicatory, despite its consolidation into a rulemaking proceeding. But even if its culminating order was regarded as enforceable under 401(b), it would be enforceable against the Ohio P.U.C., not the Maine P.U.C., which was not a party to the declaratory action. (Nor for that matter was the

Maine Commission a party to the Part 31 proceeding with which the Ohio proceeding was consolidated.)

Third, New England Telephone points to the importance of the policy that the FCC is trying to vindicate with its effort to enforce uniform national depreciation rules. The threat of uneconomic bypass of the existing telephone system is arguably serious and may well justify regulatory decision-making by a single national authority. Moreover, New England Telephone suggests that the FCC's authority to impose preemptive nationwide rules is obvious. *See, e.g., Computer & Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, ____U.S.____ (1983); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). Thus, it believes the Maine commission is acting contrary to clear law. Assuming, for the sake of argument, that all this is true, however, why must section 401(b) offer the only remedy? The federal courts are currently considering the substantive arguments concerning the FCC's authority. *Virginia State Corporation Commission v. FCC, supra.* Is it not reasonable to assume that the Maine commission and the Maine courts will read the decision? And, in the meanwhile, does New England Telephone not have a remedy sufficient to ameliorate any serious threat to the national telephone network through section 401(a); can it not ask the Commission to bring an enforcement action if the threat is truly serious? Finally, why can it not obtain an adjudication from the FCC against the Maine commission, through the same declaratory ruling procedure employed by GTE of Ohio, and *then* enforce the resultant order under 401(b) if necessary? Of course, in the process, the FCC likely will have to decide how important it is to vindicate New England Telephone's position. But this agency check permits assurance that New England Telephone's claim of public importance is correct, a determination that is properly left in the first instance to the FCC.

In sum, we conclude that New England Telephone cannot bring this case in federal court under the authority of section 401(b).

The injunction is vacated and the case is remanded to the district court with instructions to dismiss the action.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 83-1779

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *etc.*,
Plaintiff, Appellee,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, *et al.*,
Defendants, Appellants.

Before
CAMPBELL, *Chief Judge,*
BREYER, *Circuit Judge,*
and GIERBOLINI,* *District Judge.*

MEMORANDUM AND ORDER

Entered: September 10, 1984

This court held that private parties could not use §401(b) of the Communications Act to enforce an FCC rule because the word "order" in that section does not include agency rules, but, rather, refers to 'adjudicatory' orders. New England Telephone, with support from the FCC, seeks a rehearing. The panel's opinion considered most of the arguments they raise; but three points require further comment.

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* Of the District of Puerto Rico, sitting by designation.

First, New England Telephone now argues that the district court enforced, not only the FCC's *Preemption Order* (a 'rulemaking' order), but also the *Prescription Order* (an 'adjudicatory' order); it adds that the latter order provides adequate basis for §401(b) jurisdiction. This case, however, concerns an effort to apply the FCC's depreciation rules to *intra*-state rates. And, as we explained in our opinion, the *Prescription Order* expressly left open the question of where its rules would apply. The FCC decided to apply them *intra*-state in its later *Preemption* decision. Hence, this case is most naturally viewed as an effort to enforce the FCC's *Preemption Order*, which, in turn, incorporates the pre-existing *Prescription Order* depreciation rules. New England Telephone apparently began this case with this view, for it alleged in its complaint that it was "being substantially and irreparably harmed by Defendant PUC's unlawful refusal to obey the FCC's *Preemption Order*" (Complaint ¶10(a)); and New England Telephone asked that the PUC's action be declared unlawful in part "because it violates the *Preemption Order*, the Communications Act, and the United States Constitution," *id.* at 10. The FCC, in its amicus brief filed below, also characterized the case as one seeking enforcement of the *Preemption Order*. *See* Memorandum of Federal Communications Commission as Amicus Curiae, at 3. ("The FCC order that is before this Court for enforcement" is the Preemption Order.) The district court thought the same. *See* 570 F.Supp. 1558, 1565 (D. Me. 1983); 565 F.Supp. 949, 954 (D. Me. 1983). The first serious effort to recharacterize this case as one to enforce the *Prescription Order* (and to bring it via that route within 401(b)'s scope) appears in New England Telephone's rehearing petition. To accept its argument now would be unfair to other parties in the case. Thus, we reject it for that reason and because we believe it an unnatural, and hence incorrect, characterization of this federal suit.

Second, the FCC argues that our opinion runs contrary to precedent. But, that is not so. The main case the FCC cites, *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945), appears to involve, not Communications Act §401(b), but, rather, §401(a). The *Ambassador* suit was brought by the

Attorney General on behalf of the FCC to enforce a rule contained in a telephone company tariff. The Supreme Court found jurisdiction because "a departure" from the tariff "is forbidden by the Act," *id.* at 325, thus bringing the suit within the terms of §401(a) (suit by Attorney General authorized "at the request of the Commission, alleging . . . a violation of any of the provisions of this chapter. . . ."). The suit also involved joinder of subscribers as parties under 47 U.S.C. §411, which (in language that appears to apply to suits under 401(a), but not under 401(b)) authorizes joinder in proceedings "for the enforcement of the provisions of this *chapter*" (emphasis added). The FCC correctly points out that the *Ambassador* Court does not cite §401(a). It cites only to §401 in general, without specifying "(a)" or "(b)". This fact, however, could at most show no more than that *Ambassador* is ambiguous. Ambiguity and court silence do not amount to controlling precedent. The second case the FCC relies upon, *Brookhaven Cable TV, Inc. v. Kelly*, 428 F.Supp. 1216 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) involved, not rulemaking, but a declaratory order as to which the defendent was a party. The *Brookhaven* court explicitly refused to decide the 401(b) question and instead rested jurisdiction on other grounds. The remaining cases, in district courts, arise out of the current depreciation controversy. As we said before, in none of them does the court directly address the question here at issue. Thus, we believe this a case of first impression. And the fact that we can find no reported instance in section 401(b)'s fifty year history in which a private party has used it to enforce an FCC rule is some evidence that it has not conventionally been thought designed for that purpose.

Third, the FCC appeals to "expertise" and "administrative convenience" to bolster its support for the telephone company's position. We do not believe that these considerations are sufficiently powerful here, however, to turn the tide. For one thing, the FCC's claim of an administrative 'need' to enlist private, §401(b), rule-enforcement efforts is not totally plausible in light of the lack of precedent. Perhaps such private enforcement efforts would help the FCC deal with potentially hostile state commissions in the immediate context of current

telephone deregulation. But, if one steps back to ask the broader question—whether, *in general*, a private right to enforce FCC rules is likely to serve the Communications Act's regulatory ends—one must be more doubtful. As we previously stated, given the general language and broad scope of many FCC rules, to allow private rule enforcement risks significant court interference with FCC control over its own docket, with the FCC's power to interpret its own rules, and with the FCC's ability to set its own communications policy. The FCC now argues that, when rules are unclear, a §401(b) court could use the doctrine of 'primary jurisdiction' to obtain commission clarification. The primary jurisdiction doctrine, however, lacks both the clarity and the practical efficacy that would be necessary to repair such a contorted court/agency relationship. *See Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1119 (1st Cir. 1982); *cf.* Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964). Rather than rely upon this complex, ad hoc legal device, we draw the simpler conclusion that Congress did not intend Commission rules to fall within the scope of §401(b)'s word "order," thereby leaving control of their interpretation and enforcement primarily in the hands of the FCC.

For another thing, we cannot accept the FCC's claim that we should simply defer to its view of the law, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 52 U.S.L.W. 4845, 4847 (U.S. June 25, 1984). Its "views" here do not reflect agency policy reached after debate among staff or commissioners. Rather, as far as we can tell, they simply represent the General Counsel's interpretation of the statute; they are contained only in his brief. *Cf. Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971) (counsel's efforts in course of litigation are "hardly tantamount to an administrative interpretation" of a statute); *see generally Mayburg v. Secretary of Health and Human Services*, Slip. Op. No. 84-1022 (1st Cir. August 2, 1984) (discussing factors determining weight to be given to administrative interpretations of statutes). While counsel's experience entitles his opinion to respect, it cannot bind a court as to the meaning of a jurisdictional statute. Moreover, the FCC's legal argument here

threatens a highly anomalous result. Its view of statutory construction is one that would place primary authority to decide pure questions of statutory law in the hands of the agency. At the same, its interpretation of the statute in question is one that would place considerable authority to decide questions of communications policy in the hands of the courts. Each institution—court and agency—would receive comparatively greater power in the area in which it, comparatively, *lacks* expertise. The resulting picture is one of classical administrative law principle turned upside down. At least, the position seems inconsistent with the sound court/agency working partnership that administrative law traditionally has sought.

The petition for rehearing is denied.

By the Court,

FRANCIS P. SCIGLIANO
Clerk.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

D. MAINE

Civ. A. No. 83-0166-P.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF MAINE,
PETER A. BRADFORD, *Chairman,*
CHERYL HARRINGTON, *Commissioner*
and RALPH H. GELDER, *Commissioner,*
Defendants.

September 20, 1983.

OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN PROCEEDINGS FOR PRELIMINARY AND PERMANENT INJUNCTIONS

CARTER, *District Judge.*

I. INTRODUCTION

This is an action seeking declaratory and injunctive relief, pursuant to 47 U.S.C.A. §401(b) (1962) of the Communications Act of 1934 (the "Act"), *see* 47 U.S.C.A. §609 (Supp.1983), to achieve enforcement of a certain order of the Federal Communications Commission. Plaintiff initially sought

a temporary restraining order against the Defendant which was denied by Judge Cyr of this Court on June 15, 1983.

A hearing was held on August 15, 1983, on the Plaintiff's claims for a preliminary and permanent injunction, which are consolidated for decision by consent of the parties. The Court has subject-matter jurisdiction under 28 U.S.C.A. §1337 (Supp.1983). The Plaintiff was represented at the hearing by Robert A. Lewis, Esq., Ralph I. Lancaster, Esq., and Everett P. Ingalls, Esq. The Defendants, the Maine Public Utilities Commission and the individual Commissioners as defendants, were represented by Charles F. Dingman, Esq., Joseph G. Donahue, Esq., and William E. Furber, Esq. of the legal staff of the Maine Public Utilities Commission. The Federal Communications Commission (hereinafter FCC), participated as *amicus curiae* via a written submission. The Public Service Board of Vermont and the Attorney General of the Commonwealth of Massachusetts also participated as *amici* by briefs questioning the jurisdiction of this Court and urging dismissal of the case. The Court also granted a motion filed by the State of Rhode Island seeking leave to participate as *amicus* in the case. As of the date of this opinion and order the Court has received no brief from the State of Rhode Island.

The Court, having reviewed the record and the written submissions of counsel in this matter, finds the facts, states its conclusions of law and orders as follows.

II.
FINDINGS OF FACT

The Defendant, Public Utilities Commission of Maine ("MPUC"), is authorized by the laws of the State of Maine to regulate the intrastate charges, services, facilities and practices of the Plaintiff, New England Telephone and Telegraph Company ("NET"), to the extent that Plaintiff is engaged in the business of providing telephone utility service to the public within the State of Maine. The Defendants, Peter A. Bradford, Cheryl Harrington and Ralph H. Gelder, are the three Commissioners of the Defendant, MPUC.

On July 27, 1982, NET filed with the MPUC tariff revisions as a result of which it sought an increase of approximately $49.8 million in its annual revenues.

NET based its request for a rate increase in part on the FCC's adoption of the Remaining Life Depreciation Method ("RLDM"). The FCC had allowed that method for capital recapture in a rule making proceeding by its Order No. 20188, of December 5, 1980, 83 F.C.C.2d 267 (1980); *reconsidered* 87 F.C.C.2d 916 (1981). In a second rule making proceeding on the petition of the National Association of Regulatory Utility Commissions ("NARUC"), the FCC determined that Order No. 20188 did not preempt state regulatory agencies from prescribing depreciation rates and methods inconsistent with RLDM. *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, No. 79-105 (April 27, 1982). Prior to the issuance of the MPUC order, however, the FCC held proceedings which resulted in its Order No. 82-542 (hereinafter cited as "Prescription Order") prescribing depreciation methods to be utilized in rate making proceedings before the FCC involving telephone operating companies. In response to an FCC Order of Public Notice, the MPUC filed comments opposing the adoption of RLDM and rates for telephone utilities. The so-called Prescription Order was released on December 14, 1982, and since no appeal was filed, it has become final.

On January 6, 1983, in separate proceedings on the consolidated petitions of American Telephone & Telegraph Co. ("AT & T") and GTE Service Corp. on behalf of themselves and of associated Bell System operating companies, the FCC again considered the preemption issue. The resultant "Memorandum Opinion and Order," in *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, No. 79-105 (Jan. 6, 1983), (hereinafter cited as "Preemption Order") held that RLDM, as set forth in the prior FCC Order of December 14, 1982, preempted all inconsistent methodologies for treatment of depreciation allowances promulgated by state regulatory agencies in the setting of

intrastate telephone rates.[1] The Preemption Order is directed to all state regulatory agencies, is entitled an Order, grants the petition for declaratory ruling, and orders that "this order" be published in the *Federal Register* and be "served on" each state regulatory commission. Preemption Order at 1 and 17.

The Preemption Order was published in the *Federal Register* on January 19, 1983. The Defendant, MPUC, admits that it received a copy of the Order from the FCC and had general knowledge of it. Defendant's Responses to Plaintiff's First Request for Admission of Facts, Response No. 23. The MPUC also admits that the Preemption Order is currently the subject of appellate review;[2] that various states and NARUC have sought and received permission to intervene in the

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[1] It is worthy of note that the FCC's Prescription Order of December 14, 1982, explicitly reserved decision on the question of the premptive effect of the depreciation methods set forth therein on the adoption or utilization of depreciation rates and methods by state regulatory bodies in setting rates for intrastate rate-making purposes. The FCC noted, however, that "the preemptive effect of this Commission's accounting and/or depreciation determination" was before it in *Petition for Reconsideration* filed by AT & T in No. CC79-105, 85 F.C.C.2d 818 (1981), *reconsidered* 89 F.C.C.2d 1094 (1982), and a *Petition for Declaratory Ruling* filed by the General Telephone Company of Ohio. *Prescription of Revised Percentages of Depreciation*, No. 82-542, at 9 (Dec. 14, 1982). The preemptive issue was resolved in the FCC's Preemption Order which issued in those latter proceedings.

In the Preemption Order the FCC noted that its prior conclusion in those proceedings had been that the expensing order in question "was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate rate-making proceedings, unless such preemption occurs as a matter of law." *Preemption Order*, at 3 (Jan. 6, 1983). The FCC also noted its prior conclusion "that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate." *Id.*

[2] Title 28 U.S.C.A. §2342(1) (1978) states in pertinent part that the Courts of Appeals have "exclusive jurisdiction" to review "all final orders of the Federal Communications Commission made reviewable by Section 402(a) of Title 47." Pursuant to the requirements of that statute and Section 402(a), questions as to the validity of the Preemption Order are not subject to review in the District Courts because they are final orders of the FCC. *See City of Rochester v. Bond*, 603 F.2d 927 (D.C.Cir.1979). The Preemption Order is currently in the process of review before the Fourth Circuit Court of Appeals in *Virginia State Corp. Comm'n v. Federal Communications Comm'n*, No. 83-1136 (4th Cir.). As of this date no decision has been rendered in those appellate proceedings.

appellate proceedings and that the MPUC did not file a petition to intervene in the appellate proceedings. After making some inquiries, the MPUC determined "that no purpose would be served by such intervention," [3] *id.*, Response No. 30, and has not filed a motion to appear as *amicus curiae* in the proceedings on that appeal. *Id.*, Response No. 31.

On April 26, 1983, the MPUC issued its Decision and Order in *New England Telephone & Telegraph Co., Re: Proposed Increase in Rates*, No. 82-124 (April 26, 1983) (hereinafter cited as the "MPUC order").

The MPUC never undertook to challenge the Preemption Order either through direct-party status before the FCC or by participating in the appellate review of that Order in the Court of Appeals for the Fourth Circuit. Yet, in the rate-making proceedings involving NET, the MPUC declined to apply the RLDM prescribed by the FCC in its determination of NET's intrastate rates. Rather, the MPUC based its determination of NET's rates upon the WLDM, which is different from RLDM. MPUC Order at 37-39; Defendant's Responses to Plaintiff's First Request for Admission of Facts, No. 32, at 12. In considering NET's contention, the MPUC undertook a full review of the substantive propriety of the FCC's conclusions reached in both the Prescription Order and the Preemption Order. *See* MPUC Order at 30-40. As a result of analysis of issues already analyzed and decided by the FCC, the MPUC reached its own decision. It stated:

> We conclude therefore that the FCC erred both in its conclusions of blanket preemption and preemption under

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[3] The MPUC has stated in this proceeding in response to requests for admissions of fact that "the defendants [MPUC] admit that NARUC is a national organization within the membership of which are the various state public utility regulatory commissions as well as the Federal Communications Commission and various other state, federal and Canadian regulatory agencies. The defendants do not admit that NARUC serves as its agent or that at all times and in all circumstances NARUC represents the best interests of the Maine PUC, nor that it is its purpose to do so." Defendants' Responses to Plaintiff's First Request for Admission of Facts, Response No. 28. The Defendants also admit MPUC's awareness that NARUC and other state regulatory commissions had intervened in the Fourth Circuit appellate proceedings for review of the FCC's Preemption Order. *Id.*, No. 29.

> federal supremacy, and therefore we do not consider the Maine Commission bound by the FCC's *January preemption Order* in setting depreciation rates for NET. We note also, as the FCC has, that depreciation and capital recovery are overlapping concepts. To the extent that depreciation is more rapid, capital recovery is quicker and more certain. Thus, the risks to investors are reduced. Our return on equity allowance in this case assumes that our depreciation practices are controlling. If different depreciation rates are used, our estimate of the risk to investors would vary as well. Consequently no change can be made to depreciation without a reappraisal of the allowed return on equity as well.

Id. at 36 (emphasis in original). The MPUC indicated its disagreement with the FCC position as set out in the Prescription and Preemption Orders by stating:

> We are aware that three state commissions have been enjoined preliminarily from disregarding the FCC Order. While we will oppose any effort to obtain a similar injunction, we note that Maine law does not permit the Commission to resolve this matter by allowing rates under bond. Consequently, the course we are pursuing is the only way that we can protect Maine consumers from prolonged depreciation overcharges in the event that litigation against the FCC is ultimately successful.

Id. The MPUC's opinion did not consider methods to protect the utility's interests in the event that the litigation against the FCC would prove ultimately *un*successful.

In discussing NET's contention that RLDM should be employed, the Commission referred to its decision in *Continental Telephone Co. of Maine*, No. 81-61 (Dec. 23, 1981), in which it had expressed various reservations about the propriety of applying remaining life depreciation rates to Maine utilities. The Commission also found NET's analysis lacking in many respects:

> [T]he Core of NET's position appears to be that competition and technological advance have shortened

> service lives, and that as a result we should accept depreciation rates prescribed by the FCC to reflect this fact. The skeletal presentation, even though, as pointed out by NET in its reply brief, accompanied by expensive workpapers, does not address all relevant concerns.

MPUC Order at 38. The Commission noted that NET's only support for its position was a "bare calculation" made in rebuttal testimony as to the depreciation "that would be accrued using the whole life rates compared to the amounts that would be accrued as using remaining life rates." *Id.* at 38. The Commission found that this type of analysis was "circular and does not really prove anything." *Id.*

The Commission disagreed with NET's assertion that it was generally known that service lives were in a period of shortening. The Commission appeared to adopt the Public Advocate's contention that even if service lives are shortening in locations other than Maine, that shortening may not be occurring within Maine because of a tendency to repair equipment that would be replaced in other jurisdictions. The Commission also noted that "[a] major further infirmity in the FCC position is that it bears no relation to depreciation as it actually occurs. Equipment does not depreciate uniformly across the country in either an economic or an engineering sense." *Id.* at 39. Finally, in respect to NET the Commission noted an additional factor militating against its adoption of Real Life Depreciation methods and rates:

> An additional consideration is the planned transfer of assets at net book value to AT & T on January 1, 1984. On such sale, NET will receive full capital recovery for assets transferred. Higher depreciation rates now would only result in a lower sale price for those assets. The exact effect of the sale on the proposed depreciation rates is not clear. NET states that $264,000 of the $1,707,000 in increased intrastate depreciation expense due to the implementation of remaining life rates is attributable to terminal equipment accounts, which it claims would constitute the *bulk* of the assets to be transferred . . . However, as staff witness Selwyn points out, all depreciation accounts will be affect-

> ed and the assets to be transferred comprise a substantial portion of NET's assets.

Id. at 39 (citations to evidentiary sources omitted; emphasis in original).

Thus, the Commission undertook its own substantive evaluation of the propriety of application of RLDM as opposed to WLDM. This evaluation was independent of and at variance with the evaluation and determination of that issue (and related issues) previously conducted by the FCC in both the Prescription and Preemption Orders.

NET has sought review of the MPUC Order before the Maine Supreme Judicial Court sitting as the Law Court in *New England Telephone & Telegraph Co. v. Public Utilities Commission*, No. KEN-83-1907, pursuant to 35 M.R.S.A. §303 (1978). Plaintiff's Answers to Defendant's First Request for Admission of Facts, Response No. 9. Maine law specifically provides that during the pendency of such an appeal:

> no injunction shall issue suspending or staying any order of the commission and said appeal shall not excuse any person or corporation from complying with and obeying the order or decision or any requirement of any order or decision of the commission or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as *the commission* may order and direct.

35 M.R.S.A. §304 (1978) (emphasis added). The quoted statutory restriction upon the Law Court's appellate jurisdiction appears to excise from its authority, in appeals from orders of the Public Utilities Commission, the more general equitable appellate jurisdiction with respect to stays and injunctions granted to the Law Court by 4 M.R.S.A. §57 (Supp.1982-1983).

In its pending appeal to the Law Court, NET has not sought to raise for review any question as to the legality or propriety of MPUC's election to treat depreciation expense accrual on the basis of WLDM. NET presents that issue exclusively to this Court by the Complaint herein.

This Court finds that the rates established by the MPUC's Order of April 26, 1983, continue to prescribe utilization by NET of depreciation methods other than those prescribed by the FCC in the Preemption and Prescription Orders. The Commission has continued to retain the WLDM and rate structure for the determination of depreciation allowances and the recovery of depreciation in the form of expense accruals. The MPUC Order proscribes the adoption by NET of the FCC-mandated method of Real Life Depreciation and corresponding rates. The MPUC Order clearly expresses the intent of the Commission to reach a conclusion markedly at variance with the one reached by the FCC in the Prescription and Preemption Orders. The use of WLDM and rates is inconsistent with the FCC-mandated RLDM and rates.

Under the MPUC depreciation method, when an asset is acquired, a fixed life is assigned to it and the costs of depreciation are allocated over the assigned period regardless of the actual life of the asset. Recovery of those costs occurs at a slow rate at the beginning of the life of the asset. On the other hand, the RLDM technique now prescribed by the FCC as a result of the Prescription and Preemption Orders evaluates the remaining life of assets at periodic temporal intervals, and the remaining value of an asset is depreciated over its remaining life, regardless of the length of the originally assigned service life of those assets. The RLDM is conceded to result in greater recovery of asset costs early in the life of the asset. The MPUC order makes it plain that the actual expenses of the Plaintiff, including costs associated with depreciation of assets, are among those factors evaluated by the MPUC in determining what rates NET will be allowed to charge. It is clear that if depreciation of NET's assets is computed according to the FCC-mandated method rather than according to the WLDM employed by the MPUC, NET's expenses will be substantially increased with resultant increases in revenues. The Court finds that the use of the FCC-mandated accounting procedures and depreciation methodologies would result in accelerated depreciation and currently greater expense accruals for depreciation which may require a related increase in rates in future MPUC rate proceedings.

A significant objective of depreciation accounting is to assure the integrity of a utility's capital investment in the plant and equipment by which it provides its public service. It attempts to do this by assuring that capital invested in the business is fully recovered over the useful life of the depreciable asset through charges to expense. In the WLDM the calculated depreciation rate is based on the average whole life of a complex of assets. Allowances of expense for depreciation are calculated by applying the depreciation rate to the investment in assets. Certain circumstances, such as the introduction of new technology, the pressure of competition, or unanticipated wear and tear on assets during normal use, cause a change in the estimated service life of the asset complex. Such circumstances create a need for adjustment in asset life if full recovery of capital investment in assets is to be recouped through depreciation. WLDM, however, does not permit such adjustments for subsequent changes in asset life. As a result that method generates either under-accruals or over-accruals of depreciation.

The RLDM provides for the making of such periodic reevaluations of asset life for purposes of calculating depreciation. That method takes into account the portion of the original investment that has been recovered through application of past depreciation rates and deducts that amount from the asset investment. RLDM is then calculated so that the unrecovered net investment remaining in the asset complex is charged to depreciation expense over the average remaining life of the asset complex. The RLDM has built into it a corrective technique for minimizing either under-accruals or over-accruals of depreciation, thus affording greater protection to the integrity of the invested capital by adjusting depreciation recoveries as expense accruals to take into account changes in asset life.

The MPUC's methodology for setting the currently effective rates of NET takes into account a calculation of the actual expenses of NET in accordance with standard regulatory accounting procedures. These expenses, including costs associated with depreciation of assets are a factor considered by MPUC in determining the rates to be set for NET's service. The effect of MPUC's use of WLDM and rates rather than the

FCC-mandated RLDM and rates in calculating NET's intrastate rates is to reduce NET's accrual of depreciation as business expense on an annual basis by approximately $1,667,000. This reduction of depreciation expense through reduction of annual accruals of depreciation as expense results in NET being deprived of approximately $800,000 per year of internally-generated cash which would result from the application of the RLDM as mandated by the FCC. The principal effect, however, is to also prevent NET from recovering those amounts of depreciation attributable to shortenings of asset life for which no adjustment is made on a periodic basis under WLDM.

The application of RLDM as opposed to WLDM over the remaining life of currently existing NET capital plant and equipment by the MPUC in setting NET's rates for service will ultimately deprive NET of approximately $20 million of capital asset value recapture through annual accruals of depreciation as expense. This is so because NET's depreciation expense by RLDM is substantially greater on an annualized basis than the depreciation expense when computed using WLDM. In order to replace the lost cash flow benefit of the increased depreciation expense that would be realized by NET, were it permitted to use RLDM, NET is required to generate *additional* annual revenues of $1,667,000 based on the test year used in the MPUC Order or to obtain approximately $800,000 of additional capital from external financial sources for which it must pay the costs associated with production of capital in that amount. NET is not compensated *at its current* rates as established by the MPUC for the additional costs associated with obtaining that additional capital. The Court finds that as a result of the foregoing considerations, NET is currently suffering a direct economic injury as a consequence of MPUC's utilization of WLDM as opposed to the FCC-prescribed RLDM.

Subsequent to the entry of the MPUC Order, the FCC denied a stay of its Preemption Order which was sought by a motion of the New York Public Service Commission and the National Association of Regulatory Utility Commissioners. *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* No. 79-105, (July 22, 1983) (hereinafter cited as *Amendment to Part 31*). The FCC

concluded that the grant of a stay would interfere with its competitive policies.[4]

Additional findings of fact are stated, as pertinent, in the course of the Court's discussion of its conclusions of law, *infra*.

III.
CONCLUSIONS OF LAW

The evidence and contentions of the parties in this case generate the following issues:

1. Whether, on the facts of this case, the Johnson Act, 28 U.S.C.A. §1342 (1976), bars this Court from entering an injunction against the MPUC.

2. Whether FCC Preemption Order is enforceable under §401(b):

(a) Whether the MPUC is a "person" within the meaning of that term as used in §401(b);

(b) Whether the FCC intended the Preemption Order to be binding on all state regulatory bodies;

(c) Whether the FCC Preemption Order is "regularly made" and "duly served" within the meaning of §401(b);

(d) Whether §401(b) permits enforcement only against "persons" who are formal parties to the FCC proceedings resulting in such orders;

(e) Whether NET has demonstrated that it is sustaining harm as a result of the MPUC's continuing non-compliance with the Preemption Order.

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[4] The FCC commented on this Court's earlier denial of the temporary restraining order in this case. It said:

> We believe the court's conclusion that the telephone company would not suffer irreparable injury was premised on an incorrect interpretation of tariff procedures. If the Commission's decision is upheld, the depreciation expense recorded on the company's books for 1983 pursuant to this Commission's directive would not be recoverable through future tariff rates under the well established principle that past unrecovered expenses cannot be recovered prospectively.

Amendment of Part 31, No. 79-105, at 4, n.3 (July 22, 1983).

1. The Johnson Act

The Johnson Act, 28 U.S.C.A. §1342 (1976) provides as follows:

§1342. Rate orders of State agencies

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

The Congress enacted §1342 to restrict the ambit of the power of the federal courts to enter injunctions against the orders of state regulatory commissions setting rates for the charges of public utilities. *Shrader v. Horten*, 471 F.Supp. 1236 (W.D.Va.1979), *aff'd*, 626 F.2d 1163 (4th Cir.1980). One purpose of the Act was to remove constitutional challenges to such orders from the federal courts, *Bridgeport Hydraulic Co. v. Council on Water Co. Lands*, 453 F.Supp. 942 (D.Conn.1977), *aff'd*, 439 U.S. 999, 99 S.Ct. 606, 58 L.Ed.2d 674 (1978), and to channel routine rate litigation into the state courts. *Shrader v. Horten*, 471 F.Supp. 1236. The evil addressed by this statute was that of the federal court's interference with the state's control of its own function of regulating public utility rates. *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir.1974). The statute's proscription of the exercise of federal jurisdiction to grant equitable remedial relief is intended to bar only those cases where claims to such relief are within the jurisdiction of

the court solely because of concepts of diversity of citizenship or repugnance to the Federal Constitution. *See International Brotherhood of Electrical Workers v. Public Service Commission,* 614 F.2d 206 (9th Cir.1980). In short, the statute proscribes federal court action in rate controversies which would have been, in the normal course, tried in state courts but which could be brought in federal court on the basis of diversity or federal question jurisdiction. In the absence of §1342, these jurisdictional bases would operate to shift jurisdiction of such causes from the state to the federal courts.

Where the relief at issue is sought pursuant to another federal statute, however, the Johnson Act will not bar federal court jurisdiction. *Id.* In this case, the first requirement of the Johnson Act that must be satisfied in order to oust federal courts of jurisdiction in such cases cannot be met. NET invokes the jurisdiction of the court under 47 U.S.C. §401(b) to obtain enforcement of an FCC Order. Section 401(b) of Title 47 United States Code provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The central focus of this case is upon enforcement of the FCC's Prescription Order rather than upon the interference with the application of a state order affecting rates. This Court's jurisdiction over the present action is therefore based specifically upon the particular grant of jurisdiction to the federal courts, set out in §401(b), to "enforce obedience to such

order by a writ of injunction or by other proper process, mandatory or otherwise," when the other requirements of that subsection are satisfied.

The use of the word "solely" in §1342(1) permits the federal court to act where its jurisdiction is conferred independently of those jurisdictional bases enumerated in §1342, *e.g.*, where the court's jurisdiction derives from a separate statutory grant of jurisdiction. The fact that an ancillary effect of the exercise of federal enforcement jurisdiction under §401(b) may be an adverse impact upon the operation of "an order affecting rates" under §1342 is not sufficient to invoke the bar of that provision. This is so because one of the specific conditions of the operation of that statute, namely, that jurisdiction be *solely* based upon diversity or constitutional repugnance, is not met. Therefore, the Johnson Act does not bar this court from entertaining this action. *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 560 F.Supp. 844 (D.Md.1983).

2. Jurisdiction Under 47 U.S.C. §401(b)

(a) Whether the MPUC is a "Person" Under §401(b)

The contention is made that §401(b) does not confer upon this court jurisdiction over this case because the MPUC is not "a person" within the meaning of that term as used in the statute. The contention is explicitly put forth by the Public Service Board of the State of Vermont in its *amicus* brief and in the brief of the MPUC. The argument is succinctly stated in the Vermont *amicus* brief as follows:

> The statute provides for enforcement of FCC Orders against "persons" in "disobedience" thereof. In the first place, it is still another affront to logic to hold that anyone can be in disobedience of an order which does not—as the Second Preemption Order does not—command obedience but which merely declares an opinion. Secondly, a state commission is not a "person" within the meaning of §401(b). The Communications Act contains an explicit definition of the word, person, and that definition clearly does not include a state or a state agency. 47 U.S.C. Sec.

> 153i. [sic]. It includes only "an individual, partnership, association, joint-stock company, trust or corporation." Apart from the plain language of this provision, the legislature's intent to exclude state commissions from the definition of persons is made unmistakably clear by the fact that the statute contains a separate definition of state commissions. 47 U.S.C. Sec. 153t.

Brief of Public Service Board of State of Vermont as *amicus curiae* at 11.

A close reading of Section 153(i) and (t) of the Act reveals that the argument overstates the rigor of the definitional structure of the Act. Section 153 states generally that "for purposes of this chapter, *unless the context otherwise requires*" the following definitions apply. 47 U.S.C.A. §153 (1962) (emphasis added). The stressed phrase makes it clear that the definitions set out in §153 are not intended to be exclusive, exhaustive or comprehensive. Rather, they are "guideline" definitions whose scope and meaning are, as a general principle, to be varied as the context in which they are used in the Act may require in order to effectuate the congressional intent with which they are used. This view of the intended definitional flexibility contemplated by §153 is confirmed by the language used to define statutory terms pertinent to the present issue, namely, "person" and "state commission." Section 153(i) states that " 'person' *includes* an individual, partnership, association, joint-stock company, trust or corporation" (emphasis added). The use of the term "includes" in the definition belies any congressional intent that the specifically enumerated entities are meant to reflect the exclusive content of the defined noun. To the contrary, the use of that verb clearly implies that other legal entities in addition to those enumerated in the definition may be within the scope of the term "person." Further, the absence of any mandatory language in any of the definitions set out in §153 cuts strongly against any assumption of legislative purpose to rigidly prescribe the exclusive content of the terms defined or to proscribe the application of the term "person" to other legal entities when, as the initiating *proviso* states "the context otherwise requires."

Further, §153(t) states that " '[s]tate commission' means the commission, board, or official . . . which under the laws of any state has regulatory jurisdiction with respect to intrastate operation of carriers." 47 U.S.C.A. §153(t). That language is clearly intended to articulate the identity of entities or persons who shall, for purposes of the Act, be considered to be a "state commission" within the intendment of the Act. It is a definition of *inclusion* rather than one of *exclusion.* It does not follow, especially in view of §153's stated intent that definitions shall reflect contextual propriety, that *inclusion* of certain entities within the scope of "state commission" requires *exclusion* of a state commission from the meaning of "person" as set out in §153(i). Clearly, where the context of the use of the word "person" requires that a state commission be considered a person, the section contemplates that that term has sufficient scope to embrace a state commission.

It is the obvious purpose of §401 of the Act to provide procedural mechanisms for the enforcement of the provisions of the Act and of valid orders of the FCC as against those persons legally subject to them and the requirements they impose. Subsection 401(a) provides for district court jurisdiction to enforce, on application of the Attorney General, the provisions of Chapter 5 of the Act against "any person" who is in violation of the provisions of that chapter. Subsection 401(b) addresses generally the enforcement of "any order" of the FCC by providing for district court jurisdiction. It also authorizes the exercise of the district court's jurisdiction as against "any person." Finally, subsection 401(c) places upon the U.S. Attorney, on request of the FCC, the duty to institute and prosecute proceedings necessary "for the enforcement of the provisions of this chapter and for the punishment *of all violations* thereof." 47 U.S.C.A. §401(c) (Supp.1983) (emphasis added).

The statute may thus be seen to be intended to provide jurisdiction in the federal courts sufficient generally to enforce the provisions of statutory law and the requirements of FCC orders made pursuant to them. It intends enforcement to occur against "all persons" who are in violation of those provisions of law and the requirements of FCC orders. So general a concept

of enforcement cannot logically admit of an exception based upon narrow and technical distinctions of status as to particular types of legal entities. The enforcement purpose of the Act cannot be realized with its intended generality unless "all persons," in that phrase's broadest ambit, found to be bound by the Act or order are subject to enforcement as prescribed by §401(b). If any person or entity who is subject to and, therefore, obliged to obey the provisons of the law or the requirements of an FCC Order fails or refuses to do so, it is intended that the means to compel that person's obedience and compliance shall be available *via* the Act in the federal district court. Congress clearly intended that FCC Orders be enforced so long as they remain in effect. *Chesapeake and Potomac Telephone Co. v. Public Service Commission*, 560 F.Supp. 844 at 846, *quoting from Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission*, 565 F.Supp. 17, 20-21 (W.D.Wash.1983).

That being so, there is no basis to exclude from the definition of "any person" any entity that is legitimately subject to the compulsions imposed by the Act or FCC orders made pursuant to it. This is especially true of state regulatory bodies, *Chesapeake*, 560 F.Supp. at 847, which may be regularly expected to be subject to a greater incidence of required compliance with the Act and FCC orders than would most other categories of persons and entities except, possibly, regulated utilities.

It may be that in a particular case there is severe question as to whether a state regulatory body is in fact subject to an FCC order for any number of reasons or whether that order may be properly enforced against a state regulatory authority. There can be no doubt, however, that on a showing that such an entity is properly subject to the Act and FCC orders, Congress intended Section 401(b) to provide a jurisdictional basis in federal district courts for appropriate enforcement of the Act and FCC orders against that body, the other requirements of the subsection being met. That being so, this forum is available for a determination of the issue of whether or not the Act is enforceable against the regulatory authority in the face of any reasons that may be raised in defense of the proposition

that the order is not so enforceable. Any effort to limit those entities subject to the jurisdiction of the District Court on the basis of entity type or status is analytically unacceptable as a premature and *sub rosa* decision of a separate and distinct inquiry; namely, whether or not the "person" before the Court is bound by the FCC order.

> Congress could hardly have intended to allow a state commission to refuse the opportunity to seek review of a FCC Order and then to claim immunity from enforcement of the order on the grounds that it was not a "person" within the meaning of the enforcement section of the statute.

Pacific Northwest Bell, 565 F.Supp. at 21.

(b) FCC Intent that the Preemption Order be Binding on All State Regulatory Bodies

In this case this Court originally denied a Motion for a Temporary Restraining Order. *New England Telephone & Telegraph Co. v. Public Utilities Commission*, Civ. No. 83-0166P, slip op. at 7-16 (D.Me., June 15, 1983) (per Cyr, J.). Based upon the evidence presented to this Court on that motion, this Court found that the FCC's Order was intended to be preemptive of state orders but that the MPUC's "disobedience" of the Order did not subject it to enforcement under §401(b). In recognition of this Court's findings, the District Court for the Middle District of Louisiana, in reconsidering its prior decision on the point, framed the issue of the preemptive intent of the FCC. It said, "the narrow issue then is whether this particular F.C.C. Order [the Preemption Order], by its terms, *requires* that all state regulatory bodies comply and adopt the F.C.C. accounting procedures." *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, No. 83-557-A, slip op. at 6 (D.La., August 1, 1983) (emphasis added). Quoting portions of the language of ¶43 of the FCC's Preemption Order, the Louisiana Court concluded that the language could only be construed "as a direct order for the guidance of state commissions, specifically declaring that inconsistent state prescribed depreciation rates are void." *South Central Bell*

Telephone Co., No. 83-557-A at 7. There can, therefore, be no question at this juncture that the FCC intended its Preemption Order to be enforceable against *all* state regulatory bodies. The Court went on to note that:

> [T]he order nevertheless is plainly directed to all state regulatory bodies and plainly declares that their depreciation procedures must comply with F.C.C. procedures. It is thus an "order of the Commission other than for the payment of money" and may be enforced under §401(b) against any person who "fails or neglects to obey" by any party injured thereby.

Id.

This Court finds the above construction of the language of the Preemption Order in question persuasive *as to the intent of the Commission* in issuing the order. Any doubt as to the propriety of that construction is conclusively removed in this Court's opinion by action taken by the FCC since the time of writing of both Courts.

In *Amendment of Part 31*, discussed above at 12, the FCC denied a request for a stay of the Preemption Order as to state regulatory bodies, some of which were not formally before the Commission in the proceedings resulting in the Preemption Order. First of all, the fact that the FCC decided to deny to a nonparty state regulatory body a stay of the Preemption Order clearly displays the accuracy of the Louisiana District Court's determination of the FCC's intent in issuing the Preemption Order; namely, that it should apply to *all* state regulatory bodies whether or not they were formally involved in the proceedings before the Commission which resulted in the issuance of the Preemption Order. The implication which results from the denial of a stay in those proceedings cannot be otherwise than that the FCC's original intent was that all state regulatory bodies be bound by the Preemption Order.

Furthermore, the language of the Opinion and Order denying the stay explicitly rejected the argument that a stay should be granted "because customers will suffer irreparable injury if increased rates resulting from the increased depreciation expenses are permitted to be included in the revenue

requirements formula" currently being utilized by telephone utilities. *Amendment of Part 31,* ¶6, at 3. The FCC specifically noted that the rate payers' interest in this regard could be adequately protected by the state commissions' allowance of rate increases based upon the FCC-mandated depreciation method *subject to* a proper accounting order and refund procedure requiring that the additional revenues generated from rates based upon accelerated depreciation be refunded to customers in the event that the Preemption Order should be overturned on appeal. The FCC removed any doubt as to its intention that *all* state regulatory bodies should be bound by the Preemption Order on a current basis when it stated:

> The grant of a stay would interfere with our competitive policies. If a stay were to be granted, the capital recovery we found essential to the development of an efficiently functioning competitive marketplace would be halted. Moreover, there is no way that the carriers can retroactively recover the lost opportunity to recover the capital that would have been recovered in the absence of a stay if our decision is upheld on appeal. . . . [I]f a competitive marketplace is to be achieved in the interstate jurisdiction, it is essential that the exchanges keep up to date with new technology in order to insure that customers will be able to avail themselves of the benefits of the evolving competitive offerings.

Id., ¶¶ 7-8 at 4.

This articulation of the FCC's position is noteworthy in that it specifically expresses the FCC's intent as it is to be implied from its action in denying the stay; the original Preemption Order is intended to remain currently effective and binding upon all state regulatory bodies. It is of further significance in that it displays action by the FCC specifically rejecting one of the contentions urged in this case as a basis for denying enforcement of the Preemption Order under §401(b); that is, that rate payers of telephone utilities will suffer irreparable injury if the FCC-mandated depreciation methodology is adopted. Finally, the FCC's articulation is significant in that it specifically adopts as a viable basis for denying the requested

stay the proposition put forth by the Plaintiff in the present proceedings as a basis for obtaining enforcement of the Preemption Order under §401(b); namely, that if the Preemption Order is not given current effect pending the determination of its legality on appeal by the Fourth Circuit Court of Appeals, the telephone utilities will lose irretrievably the "opportunity to recover the capital that would have been recovered in the absence of a stay if our decision is upheld on appeal." *Id.*

Accordingly, this Court concludes that there is no room to doubt that the FCC *intended* the Preemption Order to operate on all state regulatory bodies and to have the effect of preempting utilization by those bodies, in the regulation of intrastate rates, of any depreciation methodology at variance with that prescribed by the Prescription Order and that, in the words of the Preemption Order itself, such alternate methods and rates *are void.* Preemption Order, ¶43, at 16.

The rulings and orders of administrative agencies carry the full force of federal law and are accorded the same preemptive effect as federal statutes. *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). It remains to be considered whether the FCC's intent in this respect could legally be carried into effect under Section 401(b).

(c) Whether the FCC Preemption Order is "Regularly Made and Duly Served" Within the Meaning of §401(b)

Section 401(b) of the Communications Act requires, *inter alia,* as a precondition to court enforcement of an FCC order that the court determine the order to be "regularly made and duly served." The Preemption Order meets this standard.

The history of the FCC's consideration of the matter of appropriate depreciation methods and rates has been detailed in Part II of this Opinion, the Findings of Fact. See text, *supra,* at 3-4, 12. All the proceedings discussed were preceded by proper Public Notice as required by 47 C.F.R. §1.403. Although the record before the Court does not indicate that the MPUC participated in the first proceedings which resulted in orders allowing the RLDM and deciding that that method did

not preempt state prescribed methods, MPUC does not contend that the orders made in the course of those proceedings were other than regularly made, and the FCC appears to have followed the usual rule making requirements set forth in 47 C.F.R. §§1.399-1.429.

Similarly, the Court is satisfied that the proceedings culminating in the issuance of the Preemption Order were properly treated by the FCC as rule making proceedings under 47 C.F.R. §§1.399-1.429. MPUC participated in the proceedings culminating in the Prescription Order but did not participate in those proceedings resulting in the Preemption Order by either seeking direct party status or joining the challenge to that Order on appeal. The court has had no instance pointed out to it, and can find none on its own independent study, with respect to which it can be asserted that the proceedings were not conducted by the FCC in accordance with the applicable rules. The Preemption Order emanating from those proceedings must be considered therefore, as "regularly made" within the intendment of §401(b). Finally, MPUC concedes that it was served with the Preemption Order and had knowledge of its content.

While not asserting any procedural irregularity in the making of the Preemption Order, MPUC does contend that it cannot be considered to be within the purview of a §401(b) Order because it is not made in an "adjudicative" context in which the MPUC was a party. This contention does not address the issue of whether the Preemption Order was "regularly made" but goes, rather, to the question of whether it is the type of order contemplated by §401(b) as ripe for enforcement under that statute.

(d) Whether §401(b) Permits Enforcement of an FCC Order Only Against "a Person" Who is a Formal Party to the FCC Proceedings Resulting in Such Order?

This issue resolves itself into one of statutory construction. The key determination to be made is that of the meaning and scope of the word "order" as used in §401(b).[5]

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[5] For the text of 47 U.S.C.A. §401(b) *see* text at 15-16.

The position of the MPUC on this issue is based wholly upon its contention that §401(b) does not contemplate enforcement of any "order" of the FCC except against *parties* who participate in the FCC proceedings from which the order to be enforced (here, the Preemption Order), results. The MPUC's core contention on this issue is set forth in its brief as; " . . . the view that 'order' as used in §401(b) must mean an order in *an adjudicatory proceeding*, specifically mandating or prohibiting an act by a party to that proceeding. In other words, 'order' must be understood in the same sense that it is used in 5 U.S.C. §551(6)." MPUC brief, at 4.[6]

NET, on the other hand, contends that the definitional elements of the term "order" as it is used in §401(b) are set out in the specific language of that section. These elements, it contends, are (1) that the agency action be an order of the agency; (2) that the order be "regularly made", (3) that the order be "duly served"; and (4) that it be "other than for the payment of money." NET's position, in essence, is that if the agency action sought to be enforced meets these criteria, specifically set out in §401(b), that action is of the kind contemplated by the statute and is to be treated for §401(b) purposes as an "order" contemplated by the statute. NET specifically asserts that there is no requirement that it be shown, to achieve enforcement of an agency action under §401(b), that the defendant in the enforcement action was a formal party to the action before the administrative agency. All that is required to be shown is that the agency "regularly made" the order and that it was "duly served." NET brief, at 6-7.

This issue has been examined, with specific reference to this Preemption Order, on two occasions; the first was this Court's "Order Denying Motion for Temporary Restraining Order" (per Cyr, J.) and the second was the "Order Amending Order for Preliminary Injunction" entered in the *South Central Bell* case. This court's discussion of the issue was in the context

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[6] The statutory reference is to the Federal Administrative Procedure Act, 5 U.S.C.A. §§500, *et seq.* (1977). Section 551 of the Act sets out definitions of terms used in the Act. Section 551(6) reads as follows: " '[O]rder' means the whole or a part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."

of determining NET's "likelihood of success on the merits" for purposes of deciding if a temporary restraining order should issue under F.R.Civ.P. 65(b).[7] The Court found the Preemption Order to be "a clear declaration of the FCC's position that the federal law preempts all state depreciation rates which are inconsistent with the rules prescribed by the FCC." *New England Telephone & Telegraph Co. v. Public Utilities Comm'n,* slip op. at 7. Nevertheless, the Court concluded that the MPUC's refusal to comply" with the Preemption Order did not constitute "disobedience of an order within the meaning of Section 401(b)." *Id.* at 8.[8]

That analysis did not dissuade the *South Central Bell* court, in its reconsideration of the issue, from the propriety of its prior course in granting the injunctive relief there sought. The

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[7] In the present posture of this matter, namely, on consideration of a request for a permanent injunction, NET's "likelihood of success on the merits" is not in issue. It is clear that this Court's prior determination of the issue as a predictive judgment at the TRO stage does not become the law of the case or otherwise bind the court at the stage of final adjudication of the merits of the claim for injunctive relief. *Berrigan v. Sigler,* 499 F.2d 514, 518 (D.C.Cir. 1974).

[8] The Court's conclusion as set out in the text was based upon five considerations. These were: (1) the court's rejection under *Columbia Broadcasting Systems, Inc. v. United States,* 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942) of NET's broadest argument that all "FCC pronouncements, including rules, regulations and adjudicatory orders" are enforceable as "orders" under § 401(b), *New England Tel. & Tel. Co. v. Public Utilities Comm'n,* Civ. No. 83-0166-P, slip op. at 8 (D.Me. June 15, 1983); (2) case law under §401(b) indicating that the section did not create "new, private rights," *id.* at 9, "does not empower private enforcement," *id.* at 10, and did not create "implied private rights of action" for either damages or injunctive relief, *id.* at 9-10; (3) the Court's conclusion that the FCC's labeling of its pronouncement as an "Order" is not controlling and that the substance of the FCC action is decisive in determining its status for enforcement purposes under § 401(b), *id.* at 11; (4) the Court's conclusion that the FCC's requirement that the order be served upon all state commissions does not necessarily display an FCC intent that nonparty regulatory agencies should be bound by the Preemption Order, *id.*; (5) the Court's conclusion that the case law and the distinction between adjudicatory orders and rules and regulations under pertinent provisions of the Administrative Procedure Act and under the Interstate Commerce Act, 49 U.S.C. §16(12) supports a conclusion that "order" as used in §401(b) was intended to mean a pronouncement that was "directive" in character. *Id.* at 12-15.

court observed that, "[n]o one disputes that this is a final order of the FCC—the issue is whether it may be enforced by a private party under §401(b) against the Public Service Commission." *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* slip op. at 5. The court said the narrow issue was "whether this particular F.C.C. Order, by its terms, requires that all regulatory bodies comply and adopt the F.C.C. accounting procedures." *Id.* at 6. After a review of the content of the terms of the Preemption Order with special emphasis on the content of paragraph 43,[9] the court concluded that the order could only be seen "as a direct order for the guidance of state commissions, specifically declaring that inconsistent state prescribed depreciation rates are void." *Id.* at 7.[10]

This Court agrees with the characterization of the Preemption Order set out by the court in *South Central Bell.* It is not necessary to decide here the more general question of whether rules and regulations promulgated by the FCC without any

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[9] Paragraph 43 of the Preemption Order sets out the reasons why the FCC concluded that a declaratory ruling was appropriate. It reads as follows:

> In this case, it appears necessary to issue such a [declaratory] ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsideration proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communicat[illegible] Act *and are accordingly void.* The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. *Both must fall in the face of overriding federal concerns and policies* (emphasis added).

[10] The positive thrust of the FCC action is even more forcibly displayed in paragraph 45 of the Preemption Order in which the FCC states:

> In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

specific directory intent, would be enforceable under §401(b). That is not the issue presented by this case. What is at issue here is whether *this* Preemption Order is of sufficiently directory effect to be within the enforcement policy intended to be implemented by §401(b), as long as other requirements specifically imposed by that section are met. This Court is persuaded that the question must be answered in the affirmative.

The Preemption Order is an FCC pronouncement undeniably intended by the FCC to bind all state regulatory agencies. The pronouncement itself is labeled as an "order." The pronouncement explicitly states "that this Commission's depreciation policies and rates . . . preempt inconsistent state depreciation policies and rates." Preemption Order, ¶45, at 17. In it the FCC "find[s] it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act *and are accordingly void.*" *Id.*, ¶43, at 16. Finally, in four *ordering* paragraphs the FCC *directs* that the Petition for Reconsideration be granted, that the Declaratory Ruling issue forthwith and that the order be published in the Federal Register and be served "on each state commission." As has previously been demonstrated, there can be no doubt but that the FCC intended for all state agencies to be bound by and to comply with the Preemption Order. See text, *supra*, at 20-24.

The very least that can be said of 47 U.S.C.A. §401(b) is that Congress meant it to be available as a vehicle to enforce compliance with FCC Orders from those "persons" whom the FCC meant to be bound by them. Here, that is precisely what NET seeks. The factual allegations of the complaint supporting that claim assert only the history of the agency action, the MPUC's failure to comply and the direct and immediate injury to NET which results from MPUC's failure to comply. The complaint seeks no damages. Its claim for relief is based upon no wrong other than MPUC's failure to comply with the Preemption Order. NET seeks no relief other than compliance with that Order. Finally, it seeks compliance from an entity whose compliance is plainly intended by the FCC. Thus, NET's whole claim, as set out in the complaint rests upon the existence of §401(b) as a means of exacting simple, direct and

immediate compliance from those who are intended to be bound by a regularly made order of the FCC.

Section 401(b) is meant to be a means to exact simple, direct compliance with an FCC order from an entity clearly meant by the FCC to be bound by it *provided* that the order was "regularly made" and "duly served." The statute provides that "any *party* injured" by the failure or neglect of "any person" to obey "*any* order" of the FCC "other than for the payment of money" while the order "is in effect . . . may apply to the appropriate district court of the United States for the enforcement of *such* order." 47 U.S.C.A. §401(b) (emphasis added). The statute goes on to provide that if the court finds the aforesaid circumstances to exist, "it *shall* enforce obedience to such order" by any of the various procedural modalities enumerated in the statute, including "a writ of injunction." 47 U.S.C.A. §401(b) (emphasis added). The clear thrust of the statutory language is that the district court *shall* grant enforcement of an FCC order to any party to the FCC proceedings where that party shows that an FCC order regularly made and duly served is in effect binding any person who has refused to comply with it, thereby occasioning injury to the party seeking enforcement. The relief afforded by the statute is clearly parallel with the relief sought by NET.

No complexity of analysis nor refinement of definitional meanings can diminish the clarity or compulsion of the statutory statement.[11] Nor can this Court find any cases that indicate

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[11] It is significant that §401(b) requires by its own terms that an order be "duly served" before enforcement of it may be had under the statute. This is obviously intended as a procedural safeguard against "a person" being subjected to enforcement proceedings on an order without first having been apprised of the existence and terms of the order to be enforced. Such a safeguard is unlikely to be necessary if the statutory intent is, as is contended by MPUC, that the statute would be available to enforce only orders of an adjudicatory type. Such orders would, in the normal course, result from adjudicatory or adversary proceedings in which the parties would be actively involved and participating. In such proceedings such parties would routinely receive notice of the order of adjudication *as the result of procedures in those proceedings.* Generally, no independent requirement of service of the order would be required. There arises a significant danger of enforcement of FCC

(footnote continues)

that the statute should be construed otherwise where the only relief sought is compliance with an "order" meeting the requirements of the statute. The cases which have been variously relied on to defeat enforcement of the Preemption Order, by establishing that §401 does not create any private enforcement rights with respect to FCC orders, are simply not factually appropriate to a situation where simple compliance is the only relief sought from the federal court. In all of those cases relief was sought that went beyond simple compliance with the order;

(footnote continued)

Orders against "persons" who lack prior knowledge of the order to be enforced only if it is contemplated that §401(b) reaches beyond purely adjudicatory orders and encompasses orders of the declaratory or rule making type.

That such was the was the underlying statutory intent in the framing of §401(b) is further buttressed by the discrete choice of subjective nouns utilized in the statute. The statute states that the entity which may seek enforcement of an order under the statute is "any *party* injured [by noncompliance with the order]." 47 U.S.C.A. §401(b) (emphasis added). This can only be intended to mean a "party" to the proceeding before the FCC which results in the order as to which enforcement is sought. Yet, the statute states that enforcement of an order may be granted against "any *person* [who] fails or neglects to obey any order . . . ." 47 U.S.C.A. §401(b) (emphasis added). The noun "person" is clearly one of greater scope and inclusiveness than the noun "party." If the Congress had intended §401(b) to apply only to orders of the adjudicatory type, the noun "party" would also have been the appropriate word to use to describe the entity against whom enforcement could be sought. The use, instead, of the more general noun "person" must be taken to reflect a deliberate distinction between those entities which could seek enforcement and those against whom enforcement could be sought.

That distinction is germane only if "order" as used in the statute was not intended to be restricted in its meaning to orders of the adjudicatory type. This more comprehensive meaning of the word "order" is entirely consistent with the definition of the term set out in the Administrative Procedure Act, 5 U.S.C.A. §551(6), on which MPUC relies. *See* n. 6, *supra*. That definition clearly permits "order" to encompass orders other than those of the adjudicatory type and specifically applies the term to those that are "declaratory in form . . . other than rule making but including licensing." 5 U.S.C.A. §551(6). That definition appears to be one of intermediate scope, being more expansive than orders of the adjudicatory type but less expansive than the more general meaning attributed to the term, in the view of this Court, as it is used in §401(b). Of course, the Congress was not required to use the term in §401(b) in the precise manner that it is used in the Administrative Procedure Act. The Court has been shown no persuasive reason why Congress would have intended to do so.

rather, what was in issue in those cases was the availability under the statute of some form of relief different than, and claimed to be derivative from, simple *compliance* with the FCC order.[12] The statute expressly provides only for enforcement to achieve *compliance*. Thus, it may be entirely appropriate to hold that the statute is not sufficiently broad in purposive scope to authorize any relief other than simple compliance.

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[12] In the case of *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), the Court had before it a certified question as to whether the Court of Appeals had the power to stay an FCC Order during the pendency of an appeal of the Order under §402(b) of the Communications Act of 1934, 48 Stat. 1064, 1093. The Court there stated as *dictum* that "[t]he Communications Act of 1934 did not create new private rights." *Id.* at 14. The issue there was not one of enforcement of an FCC Order by mandate of the court. It was, rather, whether the parties appellant could obtain relief independent of the Order itself by invoking the equitable jurisdiction of the Court of Appeals. If the appellant could do so, it would receive not that which the FCC had ordered but relief *from* the duty of compliance with the FCC Order. The Court found the stay on appeal to be authorized because the historic power of the court to enter a stay on appeal had not been taken away by the Act. *Id.* at 16-17. As the Court pointed out, the case is narrowly limited: "We merely recognize the existence of the power to grant a stay." *Id.* at 17. It does not speak at all to the question of the scope of the court's authority to enforce an FCC Order under a specific statutory grant of authority to do so.

In *Lechtner v. Brownyard*, 679 F.2d 322 (3d Cir.1982) the plaintiff had brought an action to recover damages for violation of the FCC Personal Attack Rule, 47 C.F.R. §73.1920. He also asserted a pendent claim for defamation and slander under state law. The defendant's claim on appeal that the Attack Rule did not create a private federal right to damages was sustained. The Court observed that the Attack Rule was an administrative rule that was regulatory and not remedial in nature and created no private right to damages for its violation. It is apparent that the relief sought by the plaintiff was different in kind than simple enforcement of (e.g., securing compliance with) the Attack Rule. On the facts there in question, the plaintiff could not secure compliance with the Attack Rule because the violation had already occurred. The Court could not have mandated compliance as to those past acts. What the plaintiff sought was a present remedy in damages derived from *the fact of* the past violation of the Attack Rule. That is markedly different from a request to require current compliance with the rule in broadcasting conduct. The latter relief would involve simple enforcement.

Schnapper v. Foley, 667 F.2d 102 (D.C.Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982) has only the most tenuous relevance to the Communications Act and none whatever to the enforcement

(footnote continues)

That limiting proposition, assuming it to be correct, does not mean, however, that the directory thrust of the statute (e.g.,

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(footnote continued)

of FCC Orders. The complaint in that case challenged the legality of the arrangements among certain entities of the federal government and public broadcasting stations and networks for the broadcasting of certain films. The central attack was upon a provision of these arrangements which rquired the stations/networks to copyright the films and assign the copyright to the government. The claim was that damage occurred to members of the viewing public not within range of a public broadcasting facility because the arrangements prohibited commercial broadcast of the copyrighted films. The case was actually resolved on First Amendment considerations and principles of copyright law. Apparently, in passing, the plaintiff asserted that enforcement of the ban on commercial broadcast and enforcement of the copyright would violate policies implemented by the Public Broadcasting Act. 47 U.S.C.A. §§396, *et seq.* (Supp.1983). The opinion does not reflect that violation of any administrative rule or regulation under either that Act or the Communications Act was asserted to have occurred. In that context, the Court cursorily dismissed plaintiff's contention with the observation that the Act "provides no private right of action that is available to appellants." *Schnapper*, at 116.

In *Network Project v. Corporation for Public Broadcasting*, 561 F.2d 963 (D.C.Cir.1977), plaintiff sought injunctive relief to prohibit interference with an asserted right to view uncensored public television programs and also damages for injury to the professional reputations and abilities of certain plaintiffs to market their work products for broadcast. *Id.* at 966. These claims were based in part upon "various provisions of the Public Broadcasting Act of 1967." *Id.* at 972. Thus, the relief sought was derivative from an existing duty of compliance with the Act and was not at all dependent upon the force of any action of any administrative agency. No claim was made for compliance with any specific order. With the case so postured, it seems that the Court appropriately observed that "the Act does not explicitly authorize suits to enforce its provisions," *id.*, and concluded that a private right of aetion should not be implied from the Act's provisions.

In *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 409 F.Supp. 800 (D.P.R.1975), the issue was the existence of a basis for federal question jurisdiction in an action for damages and injunctive relief against a utility under 42 U.S.C.A. §1983. The claims asserted were based on allegations that the utility injured the plaintiff, a telephone equipment supplier, by refusing to permit the plaintiff's customers (subscribers to the utility service) to connect plaintiff's equipment to the utility's service lines and facilities. That conduct was alleged to be in violation of "the applicable Federal Communications Commission's holdings, rulings and policies pertaining to interconnection of customer owned telephone terminal equipment." *Id.* at 804-5. In seeking to determine if the §1983 action had any foundation in an enforceable federal

(footnote continues)

"The court *shall* enforce obedience") is at all diminished where only simple compliance is sought by a party who satisfies all the requirements of the statute. Numerous courts have so applied the statute. *Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission,* 560 F.Supp. 844 (D.C.Md.1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Commission,* 565 F.Supp. 17 (W.D.Wash.1983); *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* No. 83-557-A (M.D.La. June 27, 1983); *amended* (August 1, 1983); *Southwestern Bell Telephone Co. v. State Corp. Commission of Kansas,* No. 83-4090, (D.Kan. April 8, 1983); *Brookhaven Cable TV, Inc. v. Kelly,* 428 F.Supp. 1216, 1221, n. 20 (N.D.N.Y.1977), *aff'd* 573 F.2d 765 (2d Cir.1978), *cert. denied* 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372 (1978); *North Carolina Utilities Commission v. Federal Communications Commission,* 537 F.2d 787, 790-91, n. 2 (4th

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(footnote continued)

right under the provisions of the Communications Act, the Court acknowledged that rights of action could be inferred from statutorily granted rights, *id.* at 813, but concluded that the right sought to be enforced was not available to the plaintiff because of the fact that the damage alleged did not occur to the plaintiff as a subscriber of the utility and because the utility occupied the status of a *connecting* carrier (as opposed to a *common* carrier). Thus, the holding of the case is not that FCC orders cannot be privately enforced but, rather, that the claim asserted in that case did not derive from any order that was binding upon the utility and that the plaintiff had no standing to enforce compliance with such order even if it did so. The decision stands for the proposition that, on the particular facts, no order of the FCC *was enforceable* by its own terms against the utility which supported the claim asserted in the §1983 action.

The case of *Kroeger v. Stahl,* 148 F.Supp. 403 (D.N.J.1957) involves the attempted enforcement of an FCC permit against one not intended by the FCC to be under a duty of compliance. There the holder of "a special temporary authorization" from the FCC to conduct certain tests having to do with station interference, sought an injunction against a municipal building inspector prohibiting enforcement of a local ordinance in such manner as to prevent construction of a tower needed by the plaintiff in order to conduct the authorized tests. The court concluded that the temporary authorization issued by the FCC was not an "order" because "[i]t simply granted a request of the plaintiff that he be permitted to conduct certain tests under limited conditions expressed therein." *Id.* at 406. The gist of the holding is that the authorization was not, by *any* construction, an order. It *required* nothing to be done. There was no obligation of compliance created by it.

Cir.1976). Such application appears to this Court to have the sanction in principle of the United States Supreme Court in its application of parallel provisions of the Communications Act, 47 U.S.C.A. §§151, *et seq.*, in *Ambassador, Inc. v. Federal Communications Commission*, 325 U.S. 317, 65 S.Ct. 1151, 89 L.Ed. 1637 (1945).

Accordingly, this Court concludes that NET was "a party" to the FCC proceeding resulting in the Preemption Order;[13] that the MPUC is "a person" bound by the Order; that the Order was "regularly made and duly served," and that the Order is one subject to enforcement within the intendment of 47 U.S.C.A. §401(b). Thus, NET is entitled to the injunctive relief it seeks if MPUC's non-compliance is causing injury, within the meaning of the statute, to NET.

(e) Whether NET Has Demonstrated That It is Sustaining Harm as a Result of the MPUC's Continuing Non-compliance With The Preemption Order.

NET contends that it is entitled to injunctive relief upon a showing that MPUC has failed to obey the Preemption Order and that some injury is inflicted upon NET as a result of that disobedience. NET Brief, at 8. NET contends that injury does in fact result from MPUC's refusal to employ RLDM for rate making purposes because: (1) NET is denied current revenues necessary to offset current levels of allocated depreciation expense under RLDM, *id.* at 9; (2) it must increase its annual external capital financing requirements by approximately $800,000 without current recovery of the cost of that additional financing, *id.* at 9-10; (3) it will not recover the full costs of existing capital assets over the period of life of those assets, thereby suffering a capital recovery shortfall of approximately $20,000,000 over the life of the present asset complex. *Id.*

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[13] The memorandum opinion and order in the reconsideration of the preemption issue released January 6, 1983 (the Preemption Order as to which enforcement is now sought) states that "the Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System operating companies (AT & T). *Preemption Order*, at 1. On the basis of this recital, NET was a "party" before the FCC in the proceedings resulting in that Preemption Order, as required by §401(b) for enforcement purposes.

MPUC makes multiple contentions on the injury issue. These are: (1) that even if RLDM is utilized, "perfect and instantaneous adjustments [of asset life] cannot in reality occur with respect to each of the company's assets, and the remaining life method does not insure in fact the perfect recovery that [NET's] hypothetical example might suggest." MPUC Brief, at 12; (2) that NET has not shown that even if such a difference in the rate of capital recovery does in fact occur, "any actual harm either to the company's investors or to the company itself" results from it, *id.* at 12-13; (3) that the depressive effect upon current cash flow occasioned by the use of WLDM and the additional cost of financing incident thereto do not result in injury to NET over the long term, *id.* at 16-21; and (4) that the use of WLDM has no long-term adverse impact on NET's earnings level. *Id.* at 21-22.[14]

The purpose of the injury requirement in §401(b) is two-fold: first, to avoid purposeless federal court interference in rate making disputes where no damage is done by disobedience of FCC orders; and second, to assure that where the effect of such disobedience is to deny an intended benefit of an FCC order, the party injured by the denial of that benefit shall have

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[14] MPUC makes additional arguments urging that this Court deny NET's request for an injunction. First, the Commission asserts that the Court must weigh the equitable considerations before granting an injunction, and it suggests that the balance of those considerations favors a denial. MPUC Brief at 23-27. The Court remains unpersuaded that it is to exercise its equitable discretion. Section 401(b) specifically states that "[i]f after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process." This Court has made the necessary determinations. No further weighing of equitable considerations is required.

MPUC also suggests that the Court may consider the validity of the FCC's Preemption Order. *Id.*, at 27-30. While this Court may enforce that Order under §401(b), the Court is satisfied that review of the validity of the Order is beyond the scope of its jurisdiction. See note 16, *infra.*

Finally, the MPUC argues that this Court should abstain from exercising jurisdiction in this case for reasons of comity and judicial economy. *Id.*, at 30-31. In making this argument, the Commission overlooks the fact that the Court is asked to act pursuant to a specific statutory grant mandating enforcement of FCC orders on the satisfaction of requirements set forth in the statute. The statutory responsibilities of this Court cannot be abnegated by resort to principles of comity or judicial economy.

an effective avenue of redress in federal court to prevent the continuance of such injury. Thus, it is clear that if the person against whom enforcement is sought can show that its disobedience of the order does not deprive the party seeking enforcement of any benefit secured to it by the FCC order in question, the federal court may not interfere in the regulatory process by the exercise of its injunctive jurisdiction. The violation is, in practical terms, merely technical and no exigency exists sufficient to require taking the enforcement process out of the normal regulatory context. In such situation, the timing of effective enforcement is not a critical factor because no harm is done by the noncompliance.

On the other hand, it is equally clear that where it appears that a benefit intended to be conferred by the order is being denied to the party seeking enforcement of it, because of disobedience of the order, the factual dynamic takes on an additional dimension. The underlying rationale of the statutory grant of authority is that parties to FCC proceedings are entitled to current compliance with FCC orders regularly made and duly served from those persons intended by the FCC to obey those orders and that such parties should not be required to suffer an injury resulting from the current deprivation of the intended benefits because of unjustified disobedience. Where deprivation of the benefit of the orders to be enforced occurs, injury takes place. The existence of that injury justifies, as a matter of legislative policy judgment, the interposition of the authority of the federal court to alleviate that ongoing injury and to preserve the sanctity and force of regularly made orders. Seen in this context, the §401(b) requirement of injury is merely a threshold requirement justifying the need for action by the federal court. The scope of injury, as the term injury is used in §401(b), is to be measured by the nature and scope of the benefit meant to be conferred by the particular order sought to be enforced. Thus, the determination of the characteristics of that benefit, within the intendment of the FCC in promulgating the particular order, becomes the critical factor in perceiving whether injury, within the meaning of the statute, results from disobedience of the order.

It is significant that the order as to which enforcement is sought is the Preemption Order. That Order has an element of impact that is not present in either Order No. 20188 or in the Prescription Order. Order No. 20188 simply *allowed* the utilization of RLDM, and the Prescription Order *prescribed* its use as a matter of FCC policy. The additional element imported into the FCC regulatory matrix by the Preemption Order is the general *compulsion* that RLDM be used to the exclusion of all other inconsistent methods and a specific invalidation of all other methods for purposes of the setting of rates to apply in either interstate or intrastate business activity of the utility.

The Preemption Order seeks, therefore, to assure that NET will not be exposed in any manner to utilization of a rate making formula based upon any method of depreciation determination and expense allowance that is inconsistent with RLDM. The benefit conferred by the Order's compulsion is simply that NET will not have to contend with efforts to use any inconsistent depreciation method.

The clear command of the Preemption Order is that NET shall have the *current*, that is, immediate and continuing, benefit of the more accurately computed, and also accelerated, recapture of capital asset value that is provided by the utilization of RLDM and rates. Those advantages were found by the FCC to be necessary to effectuate the policies which it sought to implement by the adoption of RLDM.

> Depreciation is a significant portion of the revenue requirement of the regulated telephone companies. As such, it plays an important role in determining the price at which they offer their services. If competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market. Absent such depreciation levels, improper signals will be provided to the market. Since most plant is used interchangeably to provide interstate and intrastate communication service, supply and demand is determined by the combination of imputs from service demand in both regulatory jurisdictions. Approximately 75% of exchange

> plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the cost borne by rate payers and would and could, ultimately, threaten carriers' ability to fully recover their invested capital.

Preemption Order, ¶37, at 14. The reason underlying the need for more prompt and adequate capital recovery was specifically stated by the FCC:

> The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, [sic] world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. 151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment, which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission.

Id., ¶33, at 13. It was explicitly found by the FCC that the use of competing depreciation methodologies by state regulatory bodies that were inconsistent with RLDM would have a harmful effect upon the effective achievement of the FCC's policy goals:

> Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace. Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

Id., ¶ 37, at 14-15 (footnote omitted). Hence, said the FCC: "[t]he utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace." *Id.*, ¶39, at 15. And again, "it is apparent to us that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission prescribed depreciation rates and practices. Accordingly, *it is essential to preempt inconsistent state depreciation practices* to avoid frustration of these vital national policies." *Id.*, ¶40, at 16 (emphasis added).

The purpose of the Preemption Order was, therefore, to require exclusive use of RLDM for rate making purposes and to cut off any interference with its immediate and continuing adoption and utilization. That was the benefit the FCC sought to confer on NET and all other telephone utilities by its holding in the Preemption Order.[15] It is precisely that benefit which

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[15] That the FCC sought to achieve that result to assure the effectiveness of its regulatory policies was made clear in its Order denying the stay of the Preemption Order. In *Amendment of Part 31* the FCC based the stay upon its conclusion "that preemption was necessary in order to prevent the frustration of properly adopted federal policies in the regulation of interstate communications." *Amendment to Part 31*, ¶1, at 2. The FCC further stated that "[t]he grant of a stay would interfere with our competitive policies." *Id.*, ¶7, at 4. Obviously the grant of a stay would permit disagreeing state regulatory agencies to adopt depreciation methods inconsistent with RLDM in the interim period between the issuance of the Preemption Order and the final decision on appeal from that Order. That is precisely what MPUC has sought to do during this same interim period. If the grant of the stay would frustrate the FCC's regulatory policies, so must the conduct in which the MPUC has engaged to date in disobeying the Preemption Order. It is that frustration of those policies that the Preemption Order was intended to prevent.

The policy reasons underlying the Preemption Order are clearly articulated by the language of the Order itself:

> State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this . . .
>
> . . . Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial

(footnote continues)

NET has been, and continues to be, deprived of by MPUC's course of action in refusing to accord obedience to the Preemption Order. MPUC's disobedience of the order injures NET precisely because it takes from NET the injures beneficial element sought by the FCC to be conferred by the order. That element is not the *level* or *amount of* capital asset recapture achieved per se by NET. It is, rather, the *timing* and *current applicable rate of* such recapture. The FCC intended for RLDM-based recapture to commence at once and to be on the accelerated basis provided by RLDM. By its course of disobedience of the Preemption Order, the MPUC has delayed the commencement of RLDM-based asset recapture from January 6, 1983 (the date of the Preemption Order) to this date. During that time period NET has been deprived of the benefit of the accelerated recapture rate mandated by the FCC. In both respects NET has been injured by being deprived of intended benefits of the Preemption Order. That injury, which is found by the FCC to "undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices," *id.*, ¶37, at 15, is sufficient to satisfy the injury requirement of §401(b) and justifies the intervention of the federal court into the matrix of the regulatory pattern under that statute.

(footnote continued)

> burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace. Such a result would undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

Preemption Order, ¶¶33, 37, at 13, 14-15. The FCC concluded that "[t]he utilization of one depreciation rate is the *most effective method* for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace," *id.*, ¶39, at 15 (emphasis added), and "that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission prescribed depreciation rates and practices." *Id.*, ¶40, at 15. Thus, the Order concludes on this point that "it is *essential* to preempt inconsistent state depreciation practices to avoid frustration of those *vital* national policies." *Id.* (emphasis added).

Because the critical element of the intended force of the FCC's action in the Preemption Order is temporal in nature and because that element is defeated by the delay in implementation of RLDM for NET which results from MPUC's disobedience of the order, the arguments advanced by MPUC are without merit to justify denial of the relief here sought by NET. First, MPUC contends that application of RLDM should not be required because it may not be a perfect method to recapture fully those portions of capital asset value that may be lost by shortening of asset life. That argument must fail for two reasons: (1) the ability to maximize the recovery of that portion of asset value is fully within the power of NET by its establishment of the frequency of reassessment of asset life; and (2) even assuming the method does not assure perfect recapture, the FCC has determined that the difference in the efficacy of RLDM over that of WLDM is significant enough to justify the *immediate* utilization of RLDM in order to achieve current FCC policy goals. It is that determination that is conclusive upon both the MPUC and this Court.[16]

Secondly, MPUC contends that NET is not injured because even under WLDM NET will *eventually* achieve full asset recapture under the continued application of WLDM over the full period of life of the asset complex. That contention also fails for two[17] primary reasons. The first of these is that in order for WLDM to yield even eventually the full recapture of capital asset value affected by shortening of asset life, NET is dependent upon a series of exercises of the MPUC's discretionary authority to set rates in future years. There can be no assurance, whatever MPUC may now protest as a matter of theory, that the end result of the actual exercise of that authority in those future years will in fact yield full recovery of

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[16] As discussed in note 2, *supra*, the District Court has no jurisdiction to review the validity of final orders of the FCC. That power is vested by statute exclusively in the court of appeals. 28 U.S.C.A. §2342(1) (1978). Therefore, this Court must accept the reasoning of the FCC and apply the Preemption Order.

[17] This Court is not persuaded that MPUC's contention is correct. However, it is unnecessary to set out at length the Court's analysis of the error underlying that contention since, for reasons independent of its correctness, the contention does not address the issue raised in this case.

asset value. Yet, the FCC has decreed by the Preemption Order that as of January 6, 1983. NET is entitled to that benefit as a result of the use of RLDM. The acceptance of MPUC's argument would require the displacement of an FCC-conferred certainty with a state-proposed possibility which is beset with uncertainty and delay as to its actual materialization. Nor does that argument, if adopted, respond to the denial to NET of the FCC-mandated immediate and current accelerated recapture of asset life. NET has demonstrated herein, and the FCC has found, that the asset value recapture by expense allowance which is deferred in a current year is in the end denied. Expense accruals for depreciation denied in a current year cannot be made up in subsequent years under regulatory law. *Amendment of Part 31,* at 4, n. 3.

Likewise, MPUC's contention that no injury occurs to NET within §401(b) because WLDM's depressive effect on cash flow occasions no injury in the long term, fails to address the injury done by denial of the temporal benefit of the Preemption Order.

Finally, MPUC's contention that NET may not succeed in this suit because it has not shown any harm done to its investors by MPUC's failure to render obedience to the Preemption Order misses entirely the thrust of the injury requirement of §401(b). The statute confers the right to an enforcement action on a "party injured." 47 U.S.C.A. §401(b). The party before the FCC in the preemption proceedings was the corporate entity, NET, as an associated Bell Systems operating company of AT & T. See note 13, *supra.* That entity, as the regulated utility, had the right to the benefit intended to be conferred by the Preemption Order. Therefore, upon its showing that *it* had been injured by a depreviation of the temporal benefit of immediate adoption of RLDM, the injury requirement of the statute is satisfied. NET is not required to demonstrate a particularized injury to constituent classes of interest holders in the corporate entity.

IV.
SUMMARY AND ORDER

For the foregoing reasons, this Court concludes that:

(1) The Court has jurisdiction to issue the injunction sought herein under 47 U.S.C.A. §401(b);

(2) The Johnson Act, 28 U.S.C.A. §1342, is not a bar to issuance of an injunction in this action;

(3) The Plaintiff is entitled to a preliminary and permanent injunction and that a preliminary and permanent injunction should issue herein;

(4) Unless an injunction is issued, the Plaintiff will sustain irreparable harm since MPUC's disobedience of the Preemption Order deprives NET of the temporal benefit of immediate and continuing application of RLDM and causes nonrecoverable losses of current cash flow and of recapture of asset value affected by asset life shortening. Neither the Defendants nor this Court can authorize Plaintiff to recover retroactively any revenues lost during the pendency of appellate proceedings to determine the validity of the Preemption Order. The Plaintiff will suffer harm thereby within the meaning of 47 U.S.C.A. §401(b);

(5) No harm will accrue to the other parties to this proceeding or to the Plaintiff's rate payers since the injunction herein will require Plaintiff to place the rates at issue in effect subject to refund to rate payers with interest in the event the January 6, 1983 Preemption Order in FCC Docket No. 79-105 is not upheld on appeal. Collection of rates subject to refund with interest is adequate security under F.R.Civ.P. Rule 65(c); and

(6) It is in the public interest of insuring compliance with the congressional mandate of developing nationwide uniformity in telecommunications policy to enforce a binding FCC order regarding depreciation rates and methodologies while it is in effect and that the Preemption Order is such a binding FCC order.

WHEREFORE, it is ORDERED that judgment be entered in favor of the Plaintiff, New England Telephone and Telegraph Company, on its claim for a preliminary and permanent injunction under 47 U.S.C.A. §401(b) and enforcing the *Preemption Order* against the Defendants, Public Utilities Commission of Maine; Peter A. Bradford, Chairman; Cheryl Harrington, Commissioner; and Ralph H. Gelder, Commissioner; said injunction to be in the form and substance of Exhibit "A" hereto annexed.

PRELIMINARY AND PERMANENT INJUNCTION

Plaintiff's Motion for Preliminary Injunction having come on for hearing and argument on August 15, 1983, and hearing on said Motion having been consolidated with the hearing on the merits of Plaintiff's complaint for a permanent injunction, pursuant to Fed.R.Civ.P. 65(a)(2), and the Court having this date made its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, that the Defendants, and each of them, comply strictly with the FCC's orders in *Prescription of Revised Percentages of Depreciation*, No. 82-542 (December 14, 1982) ("*Prescription Order*"), and *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, No. 79-105 (January 6, 1983) ("*Preemption Order*"), and implement the FCC-prescribed remaining life depreciation methodology and rates in setting the charges for Plaintiff's intrastate service. Compliance with this Preliminary and Permanent Injunction requires that Defendants: (1) obey the *Prescription* and *Preemption Orders;* (2) employ forthwith the FCC-prescribed remaining life depreciation methods and rates in setting Plaintiff's currently effective charges for service in Maine; (3) determine Plaintiff's increased Maine intrastate revenue requirement resulting from current implementation of such method and rates; and (4) place into effect within ten (10) days from the date of this Order schedules of rates sufficient to generate increased revenues as so determined for the test period used in *New England Tel. & Tel. Co., re: Proposed Increase in Rates*, No. 82-124 (Me.Pub.Util. Comm'n, April 26, 1982), resulting from implementation by Defendants of the remaining life depreciation rates.

All additional revenues collected by the Plaintiff as a result of implementation of the FCC-prescribed remaining life depreciation method and rates shall be collected by Plaintiff subject to being refunded to ratepayers, including those who terminate the receipt of service from the Plaintiff during the period that this Injunction shall remain in force, with interest at a reasonable rate to be set by the Defendant Public Utilities Commission of Maine. Such refund shall occur in the event that the FCC *Preemption Order* is not sustained on appeal. The refund provision of this injunction obviates any need for security to be provided to Defendants under Fed.R.Civ.P. 65(c).

The Findings of Fact and Conclusions of Law supporting the issuance of this Injunction are set out in the Court's Findings of Fact, Conclusions of Law, Opinion and Order, which are filed herewith and which are incorporated herein.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 83-1779

NEW ENGLAND TELEPHONE & TELEGRAPH CO., *etc.*,
Plaintiff, Appellee,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, *et al.*,
Defendants, Appellants.

JUDGMENT

Entered: June 29, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The district court's order of "preliminary and permanent injunction" is vacated and the cause is remanded to the district court with instructions to dismiss the action. Costs to appellants.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

Office-Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-900

In The

Supreme Court of the United States

October Term, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Response of Maine Public Utilities Commission, Respondent, to the Petition for Certiorari

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No. 84-900

In The

Supreme Court of the United States

October Term, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Response of Maine Public Utilities Commission, Respondent, to the Petition for Certiorari

The Maine Public Utilities Commission Does Not Oppose The Petition For Certiorari Filed By New England Telephone & Telegraph Company

The Maine Public Utilities Commission does not oppose the Petition for Certiorari filed by New England Telephone & Telegraph Company. While we believe that the decision of the First Circuit is correct and should be sustained, we recognize that there is a conflict among the circuit courts and that the issues in the case are im-

portant and have been the subject of extensive litigation nationwide.

The issue presented in this petition is whether private parties may use 47 USC § 401(b) to enforce a ruling made by the FCC[1] preempting the states from determining depreciation rates to be used in setting intrastate telephone rates. This issue is presently before this Court in at least two other proceedings. In *Arkansas Public Service Commission et al. v. Southwestern Bell Telephone Company*, No. 84-483, the Arkansas Public Service Commission filed a petition for certiorari seeking review of a ruling by the Eighth Circuit that private parties may enforce the FCC's Order under 401(b). *Southwestern Bell Telephone Company v. Arkansas PSC*, 738 F.2d 901 (8th Cir. 1984). The Maine Public Utilities Commission signed an *amicus* brief with fourteen other states and the National Association of Regulatory Utility Commissioners in support of the Arkansas PSC's Petition for Certiorari, noting, among other things, that the First Circuit had cited the Eighth Circuit's decision and expressly declined to follow it.

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[1] Amendment of Part 31, Memorandum Opinion and Order, 92 FCC2d 864 (1983). This decision was sustained by the Fourth Circuit in *Virginia State Corporation Commission v. Federal Communication Commission*, 737 F.2d 358 (1984). The case is now before this Court as the subject of three separate petitions for certiorari and one appeal. The first *California Public Utilities Commission et al. v. Federal Communications Commission and United States of America*, No. 84-889, was signed by 15 other states or state utility commissions, the District of Columbia Public Utilities Commission, and the National Association of Utility Regulatory Commissioners. The Maine PUC filed an *amicus* brief in this proceeding. Separate petitions for certiorari were filed by Ohio and Florida. (Nos. 84-1054 and 84-1069 respectively). The Louisiana Public Service Commission filed a jurisdictional statement. No. 84-871

The Fourth Circuit and Fifth Circuit also have held that private parties may enforce the FCC's order under 401(b). *Chesapeake & Potomac Telephone Co. v. Maryland Public Service Commission*, 748 F.2d 879 (4th Cir. 1984); *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984). The Louisiana Public Service Commission filed a Notice of Appeal in the Fifth Circuit. Its jurisdictional statement in this Court has been docketed as No. 84-870.

At least six other cases involving the same issue have been litigated in the district courts. The Vermont District Court held that state commissions are not "persons" against whom enforcement may be brought under Section 401(b). *New England Telephone v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1983), appeal pending, No. 84-7051 (2nd Cir. filed June 27, 1984); Other courts have found the FCC's Order enforceable under 401(b). *Northwestern Bell Tel. Co. v. Iowa State Commerce Commission*, No. 83-688-A (S.D. Iowa, Sept. 27, 1984); *Pacific Northwest Bell v. Washington Utilities & Washington Utilities & Transportation Commission*, 565 F.Supp. 17 (W.D. Wash. 1983), appeal pending, No. 83-3746 (9th Cir. filed April 19, 1983). *Mountain States Tel. and Tel. Co. v. Montana Dept. of Public Service Regulation*, 588 F. Supp. 5 (D. Montana, 1983), *Southwestern Bell Telephone Co. v. State Corporation Commission*, No. 83-4090, D.C. Kan. April 8, 1983); *Wisconsin Bell Inc. v. Public Service Commission of Wisconsin et al.*, No. 834-C-4, E.D. Wisc. November 13, 1984.

If the issue reaches this Court on the merits through any of the petitions for certiorari now pending, a determination that the appeal from the Fifth Circuit decision

is properly brought, or through proceedings in any of the other circuits, the Maine Public Utilities Commission would prefer that certiorari be granted in the First Circuit as well. The decision of the First Circuit could be overruled by an adverse decision in one of these other cases. If the issue does reach this Court, the Maine Public Utilities Commission would appreciate the opportunity to be heard on the merits.

———o———

CONCLUSION

For the reasons stated above, the Maine PUC does not oppose the Petition for Certiorari filed by New England Telephone Company.

DATED: February 4, 1985

Respectfully submitted,

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FILED
FEB 19 1985
ALEXANDER L. STEVAS
CLERK

No. 84-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, *Et Al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY OF NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

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February 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-900

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF MAINE, *Et Al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY OF NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

In response to the petition for certiorari filed by New England Telephone and Telegraph Company, the Maine Public Utilities Commission has filed a response stating (p. 1) that Maine "does not oppose" certiorari in this case in view of the importance of the controversy and the conflict between the circuits. However, Maine goes on to cite other enforcement cases pending in this Court and elsewhere and asserts that certiorari should be granted in the present case "if" this Court determines to hear other cases cited in the response. Response, p. 3. This reply is filed to answer Maine's apparent suggestion that review in this case may be contingent on review of other cases.

In the array of cases cited by Maine in its response, there is only a single issue on which a conflict exists among the circuits,

and only two cases now pending in this Court present the conflict. That issue is whether Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), embraces an FCC order in a rulemaking proceeding.[1] In the decision below, the First Circuit said that Section 401(b) does not embrace such orders; and in the *Louisiana* case, the Fifth Circuit held that Section 401(b) does embrace such orders, in addition to deciding a number of other issues on which no conflict exists.[2]

The other cases cited in the Maine response, limiting discussion to those pending in this Court, do not present the issue in this case on which a conflict exists and do not involve any other known conflict among the circuits. In the *Arkansas* case, review is sought of an Eighth Circuit decision in connection with an enforcement order but the question whether Section 401(b) embraces rulemaking orders was not litigated in or addressed by the Eighth Circuit, nor is its decision in conflict with the decision of any other circuit on the issues that were decided.[3] The other group of cases cited by Maine now pending in this Court seeks review of a decision of the Fourth Circuit in the *Virginia* case [4]; that decision did not involve any questions concerning the enforcement statute but addressed the merits of an FCC order determining to preempt depreciation regulation, and the Fourth Circuit's decision is not in conflict with any other circuit.

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[1] Section 401(b) provides for enforcement in the District Court of "any order" of the FCC (other than for the payment of money). In a prior case, this Court interpreted the same statutory language ("any order") used in a companion section of the Communications Act to include orders issued in rulemakings. *CBS* v. *United States*, 316 U.S. 407 (1942).

[2] *South Central Bell Telephone Company* v. *Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870. The appellee has filed a motion to dismiss or affirm in that case, pointing out that the case does not properly constitute an appeal under 28 U.S.C. § 1254(2).

[3] *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483.

[4] *Virginia State Corporation Commission* v. *FCC*, 737 F.2d 388 (4th Cir 1984). Review has been sought in Nos. 84-871, 84-889, 84-1054, and 84-1069.

In sum, the petition for certiorari in this case is not contingent on review of other cases and is in fact the only case that both presents a conflict between the circuits and is limited to issues relating to the conflict. Only the grant of certiorari in this case will assuredly resolve the conflict between the circuits as to whether Section 401(b) embraces rulemaking orders. Assuming that this Court agrees that this conflict warrants plenary review, the present case is clearly one in which certiorari should be granted.[5]

[5] In prior cases, this Court has sometimes followed the course of granting a narrowly focused certiorari petition to resolve a conflict and holding other cases that included the same issue. See *ICC* v. *American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984). If that course were followed here, the certiorari petition in this case to review the First Circuit's decision would be the appropriate vehicle because it focuses upon, and assures resolution of, the issue on which a conflict exists.

CONCLUSION

For the reasons stated in the petition for certiorari and in this reply, certiorari should be granted in this case.

Respectfully submitted,

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February 1985

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(H) (6) (4)

Nos. 84-483, 84-870 and 84-900

Office-Supreme Court, U.S.
FILED
MAY 23 1985
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL.,
PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a district court asked to enforce an order of the Federal Communications Commission (FCC) under 47 U.S.C. 401(b) may deny enforcement on the ground that the order is ultra vires, where exclusive jurisdiction to determine the lawfulness of FCC orders rests in the courts of appeals, a petition for review of the pertinent FCC order is pending in a court of appeals at the time enforcement is sought in a district court, and a stay could be sought in the court of appeals.

2. Whether the Federal Communications Commission's order preempting inconsistent regulation by state commissions is an "order" that may be enforced under 47 U.S.C. 401(b).

3. Whether a district court exceeded its authority to enforce an order of the Federal Communications Commission by requiring a state commission to permit a telephone company to increase its rates by a specific amount so as to comply with depreciation methods prescribed by the Federal Communications Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-483

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

No. 84-870

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY

No. 84-900

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitations to the Solicitor General to express the views of the United States.

STATUTES INVOLVED

Relevant statutes are set forth in the petitioners' appendix (at A71-A74) in No. 84-483.

STATEMENT

The Federal Communications Commission (FCC) determined in 1983 that state commissions could not order telephone companies to use depreciation methods contrary to those the FCC had prescribed. That order was affirmed on review by the Fourth Circuit, which had exclusive jurisdiction to determine the validity of the order and to stay or enjoin it pending review. The three cases addressed in this brief all involve disputes between telephone companies and state commissions that refused to permit the telephone companies to follow the depreciation methods prescribed by the FCC. In each case, the telephone company filed an enforcement action in a federal district court pursuant to 47 U.S.C. 401(b), seeking to compel the state commission to permit it to use the FCC's depreciation methods in state ratemaking proceedings. In the Arkansas case, No. 84-483, the Eighth Circuit overturned a district court order refusing to enforce the FCC's order on the ground that the decision was ultra vires. In the Maine case, No. 84-900, the First Circuit held that the FCC's decision that state commissions were preempted from requiring the use of inconsistent depreciation methods was not the type of "order" that telephone companies could enforce under Section 401 (b), and so it vacated an injunction issued by a dis-

trict court. In the Louisiana case, No. 84-871, the Fifth Circuit expressly rejected the First Circuit's conclusion in the Maine case and upheld an injunction issued by a district court.

1. Section 220(b) of the Communications Act of 1934, 47 U.S.C. 220(b), authorizes the FCC to prescribe "classes of property" for which depreciation may be charged and to prescribe depreciation procedures; it states that carriers "shall not" use any other classifications or depreciation procedures. In 1980, the Commission issued an order making two changes in the depreciation procedures used by telephone companies. *In re Property Depreciation*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981).[1] The next year, the Commission issued an order providing that a previously depreciable class of property should thenceforth be treated as a current expense. *In re Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).[2] The Commission made each of these changes because it concluded that the prior practices had led to out-of-phase capital recovery and misallocation of costs, which conflicted with the FCC's recently adopted policy of en-

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[1] That decision substituted "equal life grouping" in place of "vintage grouping" and the "remaining life" method of correcting errors in forecasts in place of the "whole life" method. These depreciation rules are described briefly in our Motion to Dismiss and Brief in Opopsition at 5-6 [hereinafter cited as Fourth Circuit Opposition], in *Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 et al., in which the appellant and the petitioners seeks further review in this Court of the Fourth Circuit's decision affirming the FCC's preemption decision.

[2] That decision determined that "inside wiring" should be treated as a current expense rather than capitalized. The decision is described briefly in our Fourth Circuit Opposition at 7.

couraging competition and otherwise were inconsistent with the public interest. The new depreciation methods are intended to make the marketplace operate more efficiently. 84-483 Pet. App. A19-A22.

The FCC, at the request of state commissions and telephone companies, considered whether its depreciation decisions prohibited states from requiring telephone companies to use inconsistent depreciation practices in state ratemaking proceedings. After first deciding that state commissions were not preempted (*In re Uniform System of Accounts*, 89 F.C.C.2d 1094 (1982)), the Commission unanimously determined that state commissions had to follow its recent depreciation decisions if the purposes of those decisions were not to be frustrated. The Commission also determined that Section 220(b), as a matter of law, ousted the states from any role in setting depreciation rates for telephone equipment used in part for interstate services unless the FCC expressly authorized such a role (84-483 Pet. App. A1-A34). The FCC gave general notice of this order (the *Preemption Order*) by publication in the *Federal Register* and by serving a copy of its order on each state commission (*id.* at A25).

Pursuant to the Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, a court of appeals may review an FCC order, such as the *Preemption Order*, if a petition is filed within 60 days. The court of appeals in which the petition is filed has "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency" (28 U.S.C. 2349 (a)). A statutory transfer procedure provides that all review of an agency order may be centralized in one court of appeals (28 U.S.C. 2112(a)). That

court of appeals may stay the FCC order pending judicial review, on a proper showing (28 U.S.C. 2349 (b); Fed. R. App. P. 18).

The *Preemption Order* was appealed to the Fourth Circuit by the Virginia State Corporation Commission. The Louisiana commission and the Arkansas commission intervened in that proceeding and participated in the briefing, along with 15 other state commissions. None of the parties sought to stay the FCC's order. The Fourth Circuit upheld the *Preemption Order* in June 1984. Applying this Court's decision in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982), the court of appeals held that the FCC acted within the scope of its "authority to insure efficient operation of the interstate telephone network." *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388, 394 (4th Cir. 1984). A jurisdictional statement and three petitions for a writ of certiorari have been filed seeking review of that decision (Nos. 84-871, 84-889, 84-1054 and 84-1069).

2. The Arkansas case arose after the FCC's *Preemption Order* but prior to the Fourth Circuit's decision. A "three-way meeting" was held by the FCC, the Arkansas Public Service Commission, and Southwestern Bell.[3] Following the meeting, the FCC issued an order, in December 1983, prescribing depreciation rates for Southwestern Bell's operations in Arkansas. *In re Prescription of Revised Percentages of Depre-*

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[3] The FCC historically has called periodic "three-way meetings" of telephone companies and federal and state regulators to consider depreciation rates for particular companies. See *In re Prescription of Revised Percentages of Depreciation*, 88 F.C.C.2d 1223, 1225 (1982).

ciation, 96 F.C.C.2d 257, 291 (1983). The order made clear that state commissions were required to follow the prescribed depreciation procedures (*id.* at 261-262 n.3). No party sought review of that order.

In January 1984, the Arkansas commission denied Southwestern Bell's rate proposal, which had sought to recover increases in depreciation expenses that the telephone company had calculated on the basis of the FCC's prescriptions. *Re Southwestern Bell Telephone Co.*, 58 Pub. Util. Rep. 4th (PUR) 82 (Ark. P.S.C. 1984). The Arkansas commission took "administrative notice" of the FCC's December 1983 depreciation order for Southwestern Bell's operations in Arkansas (*id.* at 90); but it refused to comply with that order and with the *Preemption Order*, stating that it was "convinced that the FCC is totally without any valid legal foundation to support its claim of preemption over the states with regard to intrastate depreciation rates" (*id.* at 93-94).

Southwestern Bell then sought enforcement of the FCC's orders in the United States District Court for the Eastern District of Arkansas under 47 U.S.C. 401(b). Section 401(b) provides that, if "any person fails or neglects to obey any order of the [FCC] * * * any party injured thereby * * * may apply to the appropriate district court of the United States for the enforcement of such order." The statute provides that the district court "shall enforce obedience to such order" if it finds that the order was "regularly made and duly served." The Arkansas commission stipulated that it was not obeying the *Preemption Order* and that the order was "regularly made and duly served." It disputed the FCC's authority to issue depreciation prescriptions that preempt state commissions.

The district court, in an opinion issued prior to the Fourth Circuit's decision upholding the *Preemption Order*, refused to enforce the FCC's orders. It noted that, under the Hobbs Act, "only a court of appeals may invalidate an FCC order" (Pet. App. A36). But the district court denied enforcement after determining that the *Preemption Order* was "ultra vires" because its prescription of uniform depreciation procedures necessarily affected intrastate ratemaking (*ibid.*).

The Eighth Circuit reversed (Pet. App. A43-A55). It noted that this Court had made clear, in *FCC* v. *ITT World Communications, Inc.*, No. 83-371, slip op. 4 (Apr. 30, 1984), that "[l]itigants may not evade" the provision of the Hobbs Act providing that exclusive jurisdiction to review FCC orders lies in the courts of appeals by arguing in a district court that an FCC order is ultra vires. But the district court had "countenanced just such an evasion" by the Arkansas commission (Pet. App. A50). The Eighth Circuit did not read the Hobbs Act as "withholding all discretion from the district court with respect to the issuance of an injunction," but concluded that, under the facts of this case, a refusal to enjoin the Arkansas commission's disobedience would be an abuse of discretion (*id.* at A54). The Eighth Circuit noted that the Arkansas commission was participating in the Fourth Circuit's review of the *Preemption Order* but had not sought a stay in that Court. The Eighth Circuit characterized the Arkansas commission's action as a "studied consideration of * * * defiance" of the FCC's order (*id.* at A54). It therefore ordered the district court to enter the injunction requested by Southwestern Bell, noting that it

could reconsider the injunction when the Fourth Circuit ruled on the validity of the *Preemption Order*.[4]

3. The Maine case arose in July 1982, when New England Telephone sought a rate increase from the Public Utilities Commission of Maine based on the depreciation methods prescribed by the FCC. As in the Arkansas case, the Maine commission refused to permit the telephone company to follow the FCC's prescriptions because it held that "the FCC erred" in concluding that it could issue preemptive depreciation prescriptions. *New England Telephone & Telegraph Co.*, No. 82-124 (Apr. 26, 1983), slip op. 36. New England Telephone filed an enforcement action under Section 401(b), and the United States District Court for the District of Maine issued an injunction instructing the Maine commission to permit the telephone company to use the depreciation practices prescribed by the FCC (Pet. App. 42c-44c).

The First Circuit reversed (Pet. App. 1a-14a). It held that the *Preemption Order* is not an "order" under Section 401(b). The court ruled that only "adjudicative orders," as opposed to orders resulting from rulemaking proceedings, may be enforced under that Section. The court recognized (Pet. App. 11a) that "our interpretation requires reading [order] differently" in Section 401 than this Court read the word "order" in Section 402 (47 U.S.C. 402) in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942). But the court found other argu-

[4] On remand, and after the Fourth Circuit's decision, the district court issued an injunction instructing the Arkansas commission to permit Southwestern Bell to use the depreciation methods prescribed by the FCC for state ratemaking purposes.

ments persuasive. The court concluded that other sections of the Act "use the word 'order' in a way that seems to envision Commission decisions requiring specific actions of specific carriers," while the *Preemption Order* has general applicability (Pet. App. 10a). In the court of appeals' view, Section 401(b) "can be read more fairly and coherently" if "order" is narrowed to permit enforcement actions in district courts only of such specific orders (Pet. App. 9a). Furthermore, as a policy matter, the court thought it desirable to prohibit private parties from enforcing orders of general applicability so that the FCC could itself determine when enforcement actions regarding such orders were needed.

New England Telephone sought rehearing. It argued that its enforcement action could be viewed as an action enforcing a 1982 adjudicative order, *In re Prescription of Revised Percentages of Depreciation* (*1982 Prescription Order*), 92 F.C.C.2d 920 (1982), the type of order that the First Circuit concluded could be enforced by a private party under Section 401(b). The First Circuit issued a supplemental opinion rejecting this argument. It noted that the *1982 Prescription Order* "expressly left open" the issue whether its depreciation rules were preemptive so that it was not accurate to say that New England Telephone sought enforcement of that order (Pet. App. 2b). Furthermore, the court stated, New England Telephone had not made this argument previously, and it "would be unfair to other parties in the case" to accept it on rehearing (*ibid.*).

4. The Louisiana case arose in May 1982, when South Central Bell sought a rate increase that was based in part on application of the FCC's depreciation methods. The Louisiana Public Service Commis-

sion denied the telephone company's request (J.S. App. A99-A101). The Louisiana commission "clearly implied its refusal to implement FCC-prescribed depreciation methods" (*id.* at A10 (footnote omitted)). South Central Bell filed an enforcement action under Section 401(b) in the United States District Court for the Middle District of Louisiana, and that court issued a preliminary injunction ordering the Louisiana commission to permit the telephone company to use the depreciation practices prescribed by the FCC.

The Louisiana commission responded by finding that application of those methods resulted in an increased expense level of $40.5 million. But the Louisiana commission decided, without further proceedings, to reduce the telephone company's rate of return from 13.5% to 12%, so it approved a rate increase of $12.7 million rather than $40.5 million. J.S. App. A10-A11.

The district court then concluded that the Louisiana commission "has not complied with the order of this court" (J.S. App. A55). The court stressed that this commission "received no evidence" before adjusting the rate of return; it instead engaged in "a simple exercise in arithmetic design to minimize the increase in telephone rates" (*ibid.*). The district court modified its injunction by ordering the commission to permit South Central Bell to increase its revenues in order to recover the entire amount the commission had determined was required on account of application of the depreciation practices prescribed by the FCC.

The court of appeals affirmed (J.S. App. A1-A35). It first considered the position adopted by the First Circuit in the Maine case—that the *Preemption Order* is not an "order" under Section 401(b)—and re-

jected it (J.S. App. A17-A23). The court noted that "the First Circuit was not able to cite * * * a single precedent in support of its" narrow interpretation (*id.* at A18). On the contrary, *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945), in which the Court assumed that "order" under Section 401 included rulemaking orders, and *Columbia Broadcasting System* v. *United States, supra,* in which the Court read "order" under Section 402 to include rulemaking orders, strongly supported the conclusion that the *Preemption Order* is an "order" (J.S. App. A18-A20).

The Fifth Circuit also found the policy justifications underlying the First Circuit's decision unpersuasive. Contrary to the First Circuit, the Fifth Circuit "simply [did] not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined" by reliance on private enforcement of rules (*id.* at A22). Indeed, the court noted that unfairness can result from non-compliance with an administrative rule, and situations exist where only a private party has a sufficient interest to enforce compliance (*id.* at A21-A22). In any event, it also noted, the FCC can "avoid private incursions upon its enforcement responsibilities" by intervening and by filing amicus briefs; and courts may apply the doctrine of primary jurisdiction in order to obtain the FCC's views, when needed (*id.* at A22). Accordingly, the Fifth Circuit held that "the FCC Preemption Order is an order within the meaning of § 401(b)" (*id.* at A23).

The court of appeals also rejected the Louisiana commission's attack on the district court's modified preliminary injunction. Like the district court, the

court of appeals recognized that state commissions have primary authority to set intrastate rates (*id.* at A28). But the court of appeals found that the district court's determination that the Louisiana commission had adjusted the rate of return without further proceedings merely to avoid high telephone rates was not clearly erroneous (*id.* at A30-A31). And the court determined that, since "it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that presumption," the Louisiana commission erred in reducing the rate of return summarily merely to offset increased depreciation expenses (*id.* at A29-A30).

ARGUMENT

In our view, none of the issues raised by these cases warrants the Court's attention. The ultimate issue underlying the disputes between the telephone companies and the state commissions—the validity of the FCC's *Preemption Order*—is not properly presented by any of these cases. That issue is presented by the petitions and jurisdictional statement challenging the Fourth Circuit's affirmance of the FCC's *Preemption Order*. See our Fourth Circuit Opposition. While there is a conflict between the First and Fifth Circuits regarding the type of "order" that may be enforced by private parties under Section 401(b), and while we think that the First Circuit erred in holding that private parties may not enforce orders of the kind involved here, its decision is unlikely to have any important consequences. Nor do we think that the modified preliminary injunction upheld by the Fifth Circuit requires review.

1. None of these three enforcement cases properly presents the issue whether the FCC acted within the scope of its authority in issuing the *Preemption Order*. The Eighth Circuit (Pet. App. A55), the First Circuit (Pet. App. 5a), and the Fifth Circuit (J.S. App. A13) each recognized that, under the Hobbs Act, the Fourth Circuit had exclusive jurisdiction over that issue.[5] That is correct. And, as we argue in our opposition to the Fourth Circuit petitions, that court properly applied settled law in upholding the *Preemption Order*, so there is no need for this Court to review that issue even in the one case that properly presents it—the Fourth Circuit case.

The Arkansas commission nevertheless argues (Pet. 6-19) that the Eighth Circuit should have held the *Preemption Order* ultra vires, and that its refusal to do so is inconsistent with three decisions of this Court, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). But the Arkansas commission is wrong in contending that the Eighth Circuit refused to recognize that courts enforcing orders under Section 401(b) retain equitable power to refuse to enforce those orders. Citing *Hecht Co.* v. *Bowles*, *supra* (Pet. App. A54), the Eighth Circuit held that district courts retain some discretion to refuse to enforce orders under Section 401(b) even when all the statutory requirements for enforcement are met. It instead merely held that, "[u]nder the circumstances of this case, * * * denial of injunctive relief would

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[5] Thus, no error was committed of the sort that occasioned our petition for a writ of certiorari in *ICC* v. *Tri-State Motor Transit Co.*, No. 84-1515 (filed Mar. 25, 1985).

be an abuse of discretion" (Pet. App. A54). In reaching this conclusion, the court of appeals gave particular weight to what it regarded as the Arkansas commission's studied defiance of the FCC's order, even though the state commission could have sought a stay of that order in the Fourth Circuit review proceeding in which it was a party (*ibid.*). Thus, most of the argument in the Arkansas petition misses the mark because the commission has misread the Eighth Circuit's opinion.[6]

2. Despite the conflict in the circuits, we do not think that this Court need consider the issue of what type of "order" may be enforced under Section 401 (b).[7] While, in our view, the First Circuit's decision is erroneous, that decision will probably not have important consequences. In part this is because the First Circuit's holding, as modified on rehearing, should not bar private enforcement actions involving FCC depreciation prescriptions in the future. If we are wrong, the Court may address the issue when a future private enforcement action is barred.

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[6] Moreover, the Fourth Circuit's decision upholding the *Preemption Order*, which followed the Eighth Circuit's decision that the *Preemption Order* cannot be deemed ultra vires, confirms that the Eighth Circuit was correct. Since, in our view, there is no need for this Court to review the Fourth Circuit's decision (see our Fourth Circuit Opposition), which squarely presents the issue of the FCC's preemptive power over depreciation methods, *a fortiori* there is no justification for this Court to consider the issue as presented in the Arkansas case.

[7] The conflict is between the First and the Fifth Circuits. The Arkansas commission did not argue that the *Preemption Order* is not an "order," so the Eighth Circuit did not address the issue.

On the merits, we think the Fifth Circuit has shown that the First Circuit erred in its legal analysis. The First Circuit acknowledged, in its first decision, that its holding necessitated differing interpretations of "order" in Section 401 and Section 402, in light of this Court's decision in *Columbia Broadcasting System* (Pet. App. 11a-12a). In its request for rehearing, New England Telephone noted that the Court in *Ambassador, Inc.* v. *United States, supra*, had assumed that private parties could enforce rulemaking orders. In its supplemental opinion, the First Circuit stated (Pet. App. 2b-3b) that *Ambassador* is distinguishable because it might have involved Section 401(a) rather than Section 401(b), since the Court did not specify which subsection of Section 401 was being construed. But the Fifth Circuit showed that *Ambassador* involved Section 401(b), not Section 401(a). The Fifth Circuit reasoned that, since Section 401(a) authorizes actions to enjoin violation of the Communications Act itself, while Section 401(b) authorizes actions to enforce orders of the FCC, and the suit in *Ambassador* sought to enforce a rule contained in a telephone company tariff, and not to enforce a provision of the Act itself, it must have been brought under Section 401(b) (J.S. App. A18-A19 & n.18).

The First Circuit also erred in its policy analysis. As the Fifth Circuit concluded (J.S. App. A22), federal interests are generally advanced by the availability of private enforcement of FCC orders, including those orders resulting from proceedings similar to those involved in these cases. In cases where that is not so, the agency, by participating as an intervenor or an amicus, and the courts, by invoking the doctrine of primary jurisdiction, can adequately protect federal interests.

But, despite these errors, the First Circuit's decision is not likely to cause harm beyond the loss to the telephone company involved in that case. Its position has not only been rejected by the Fifth Circuit, but by the Fourth Circuit as well (*Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 748 F.2d 879 (4th Cir. 1984), petition for cert. pending, No. 84-1362), and we would expect it to be rejected if raised in other circuits. In addition, as the First Circuit itself noted (Pet. App. 3b), private actions seeking enforcement of orders resulting from FCC rulemaking proceedings have been rare. It may be that, after the unusual flurry of litigation resulting from the recent changes in the telephone industry, such actions will again become rare.

In any event, it is not clear to us that the First Circuit's opinion will be troublesome in the future, even in cases brought in that circuit. In its rehearing petition, New England Telephone argued that, even if it could not seek enforcement of the *Preemption Order*, the FCC's *1982 Prescription Order* was specific enough, under the First Circuit's analysis, to qualify as an adjudicative order that it could enforce. The First Circuit gave two reasons for rejecting that argument. One reason, which will not apply in the future, was that it would be unfair to the other parties in the Maine case to permit New England Telephone to raise the argument on rehearing. The other reason was that the *1982 Prescription Order* preceded the *Preemption Order* and "expressly left open the question" whether its prescriptions preempted the states. Starting with the FCC's 1983 *Prescription Order*, however, each depreciation prescription order specifically states that it preempts state rules (see,

e.g., 96 F.C.C.2d at 261-262 n.3). Since the FCC issues depreciation prescription orders for approximately one-third of the nation's major telephone companies each year (*id.* at 260)—after three-way meetings involving the FCC, the telephone company, and a state commission—by the end of this year a depreciation prescription order that expressly states that it has a preemptive effect should be in force for nearly all of the nation's telephone companies. As we read the First Circuit's supplemental opinion, even that Circuit may permit private actions to enforce these prescription orders. Therefore, the issue presented in this case may not arise again, at least not after this year. Since the conflict in the circuits may have no future impact by the time this Court can resolve it, there is no need for review of this issue.[8]

3. The Louisiana commission also contends that the Fifth Circuit erred in upholding the district court's modified preliminary injunction.[9] It char-

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[8] If the Court concludes that it should resolve the conflict between the First and Fifth Circuits on the issue whether the *Preemption Order* is an "order" enforceable under Section 401(b), we submit that it should confine its grant of certiorari to that issue, affirm the Fifth Circuit, and reverse the First Circuit.

[9] The Louisiana commission may not obtain review of this issue by appeal under 28 U.S.C. 1254(2).

First, the injunction at issue is a preliminary injunction. Under *Slaker* v. *O'Connor*, 278 U.S. 188, 189-190 (1929), only "final judgments" are subject to review under Section 1254(2). See *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956). That rule has been questioned (*City of New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976); *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77, 82-83 (1958)), but never repudiated. In *Doran* v. *Salem Inn, Inc.*, 422 U.S.

acterizes the district court's action as requiring state commissions to freeze authorized rates of return (J.S. 23). This is simply not so. There is actually

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922, 927 (1975), the Court dismissed an appeal, citing *Slaker*, and noting that the party sought "review of the affirmance of a preliminary injunction." Commentators agree that Section 1254(2), like 28 U.S.C. 1257(2), should be subject to a "final judgment" requirement. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037, at 36-39 (1978). In particular, those commentators argue that appellate jurisdiction ought not lie under Section 1254(2) to review "decisions that affirm a preliminary injunction" (*id.* at 38). That position is fortified by this Court's recent statements that statutes authorizing appeals are to be construed narrowly (see, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983)). A narrow construction leads to retention of the final judgment rule of *Slaker*. Since the Louisiana commission challenges a preliminary injunction, rather than a final order, an appeal is not proper.

Second, the district court did not strike down any state statute (see *Silkwood*, slip op. 7-8); it merely ordered the Louisiana Public Service Commission to obey an injunction requiring it to follow the FCC's prescribed depreciation methods. The Louisiana commission cites two cases, *Atchison, T. & S. F. Ry.* v. *Public Utilities Commission*, 346 U.S. 346 (1953), and *Lake Erie & W.R.R.* v. *State Public Utilities Commission*, 249 U.S. 422 (1919), decided under 28 U.S.C. 1257(2), that held that orders of state commissions were "legislative in nature." To be sure, ratemaking has legislative origins, since in the past some state legislatures set utility rates. In light of the policy that statutes authorizing appeals are to be construed narrowly, these decisions, decided under Section 1257(2), ought not be extended to Section 1254(2). See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (Puerto Rican statute is not a state statute under Section 1254(2)), and *Torres* v. *Puerto Rico*, 442 U.S. 465, 468 (1979) (appeal lies under Section 1257(2) to review a

very little difference between the parties on any question of importance in the future. The only real issue is whether the Louisiana commission followed the district court's original preliminary injunction. We think that it is clear that the Louisiana commission flouted the court's order, necessitating the modified injunction as a remedial action by the district court to vindicate its own original order.

The Louisiana commission complains (J.S. 21) that "[t]he FCC never suggested that the *Preemption Decision* could bind a state commission to a previously authorized rate of return," implying that the FCC has changed its position. The FCC has not changed its position and agrees with the Louisiana commission that a state commission may adjust its authorized rate of return in light of the adjustment of other factors, including depreciation practices, that affect investor risk. Thus, there is no disagreement that primary authority over intrastate ratemaking lies with state commissions. The FCC's interest is in requiring adoption of depreciation methods that insure accurate allocation of costs so that telephone companies will replace equipment when, in economic reality, it is efficient to do so. The FCC is not in the business of setting intrastate telephone rates.

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decision upholding a Puerto Rican statute). There is no good reason to characterize ratemaking orders as state statutes under Section 1254(2). Unlike statutes, they are not codified and are generally transitory in nature, reflecting changes in economic conditions. Accordingly, this Court should not extend the meaning of "state statute" under Section 1254(2) to include ratemaking orders.

Should the Court disagree with our submission that an appeal does not lie in No. 84-870, it should affirm the judgment for the reasons stated in this brief.

The FCC and the Louisiana commission disagree only on the specific question of whether the state commission's abrupt adjustment of the rate of return in this case was correctly characterized as disobedience to the district court's injunction, rather than as a separate ratemaking decision. We think the Fifth Circuit's opinion makes clear that it was properly found to be the former. The state commission held no hearings and considered no new evidence before adjusting the rate of return (J.S. App A31). It presented its argument that the adjustment was warranted in light of reduced investor risk caused by the change in depreciation practices for the first time in its reply brief in the court of appeals (*ibid.*). In these circumstances, the district court did not abuse its discretion by modifying its injunction so as to effectuate its previous order. In any event, whether, under the peculiar facts of this case, the district court correctly determined that the Louisiana commission was improperly evading compliance with the court's injunction is not a question warranting review by this Court.[10]

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[10] The Louisiana commission's other arguments also do not warrant review by this Court. The Johnson Act, 28 U.S.C. 1342, does not foreclose federal court jurisdiction in this case because jurisdiction is not based on diversity or on a claim that the state's rate order was unconstitutional, but on a federal statute expressly authorizing the district court to act (J.S. App. A33 n.28). There is, finally, no basis for the argument that state commissions are exempt from enforcement actions under Section 401(b) on grounds that they are not "persons." The definition of "persons" in the Act is broad and inclusive (47 U.S.C. 153(i)). No court of appeals has accepted this argument, and thus there is no conflict at that level for this Court to resolve.

CONCLUSION

The Court should dismiss the appeal in No. 84-870 for want of jurisdiction and treat the papers on which that appeal was filed as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103. The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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